Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

VINCENT CUSANO, p/k/a Vinnie Vincent and d/b/a Streetbeat Music and d/b/a Vinnie Vincent Music,

Petitioner,

v.

GENE KLEIN, PAUL STANLEY nee STANLEY EISEN, THE KISS COMPANY, GENE SIMMONS WORLDWIDE, INC., SIMSTAN MUSIC LTD., KISSTORY LTD., and POLYGRAM RECORDS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: May 22, 2006

QUESTION PRESENTED

Under a Chapter 11 bankruptcy plan of reorganization, properly scheduled assets of the estate that are assigned to the Debtor, and as to which no competing claims by Creditors are accepted or reserved, revert to the Debtor free and clear of claims by Creditors upon confirmation of the plan. 11 U.S.C. § 1141. The question presented by this Petition is:

> Whether the Ninth Circuit committed plain error in reviving and accepting competing claims and defenses by former Creditors that were barred by *res judicata* – in that they could have been, but were not, raised during the bankruptcy proceedings – thereby denying the former Debtor his ownership rights to reverted assets?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff/Appellant in the courts below was the current Petitioner, Vincent Cusano.

Defendants/Appellees in the courts below were Respondents Gene Klein, Paul Stanley *nee* Stanley Eisen, The KISS Company, Gene Simmons Worldwide, Inc., Simstan Music Ltd., KISStory Ltd., and Polygram Records, Inc.

Horipro Entertainment Group was a defendant at an earlier stage in the case but the claims against Horipro were transferred to New York and Horipro was not a party to the instant appeal that is the subject of this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

A prior decision of the Ninth Circuit in this case, reversing in part an earlier summary judgment in favor of defendants and providing necessary context as to the reversion to Petitioner of assets from the bankruptcy estate, is reported at 264 F.3d 936 and is reproduced herein as Appendix B (pages B1-B21). The decision of the district court granting summary judgment for defendants on the claims at issue here is re-

ported at 280 F. Supp.2d 1035 and is reproduced herein as Appendix C (pages C1-C14). The decision of the Ninth Circuit affirming the district court is unpublished but available at 153 Fed. Appx. 998, 2005 WL 3046418, and is reproduced herein as Appendix A (pages A1-A3). The Ninth Circuit's denial of rehearing *en banc* is unpublished and is reproduced herein as Appendix D (pages D1-D2).

JURISDICTION

The Ninth Circuit issued its opinion on November 15, 2005 and denied rehearing *en banc* on December 23, 2005. Justice Kennedy granted Petitioner an initial extension of time to file this Petition through April 24, 2006, and a second extension of time through May 22, 2006. This Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. § 1141, which provides, in relevant part:

> **(a)** Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
>
> **(b)** Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> **(c)** Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirma-

tion of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.
* * *

STATEMENT OF THE CASE[1]

1. Petitioner Vincent Cusano, professionally known as Vinnie Vincent, was the lead guitarist for the rock band KISS from 1982 to 1984. During that time Petitioner co-authored and performed, *inter alia*, eight songs on 1983's "Lick It Up" album (hereinafter the LIU compositions).[2] The Lick It Up Album was a tremendous success for KISS, quickly going platinum and revitalizing the band, whose momentum had stalled by the early 1980s. The album and its songs continue to produce considerable revenues to this day.

Under the Copyright Act, 17 U.S.C. § 201, jointly authored works are co-owned equally by the co-authors, absent an agreement to the contrary. Petitioner's undisputed co-authorship of the LIU compositions thus gave him an undivided 50% ownership interest in the copyrights for those compositions, which includes a right to 50% of any royalties from those compositions. The royalty streams for musical compositions are ordinarily divided equally into so-called "songwriter's" and "publisher's" shares. Petitioner was both a co-author and co-publisher of the LIU compositions. Thus, absent a different agreement, Petitioner was entitled to 25% of the royalties as his songwriter's share and 25% of the

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[1] Unless otherwise noted, the facts are taken from the Ninth Circuit's 2001 decision from a previous appeal in this case, attached as Appendix B, and from the subsequent decisions of the district court and the Ninth Circuit that are the direct objects of this Petition, attached as Appendices C and A, respectively.

[2] While with the band, Petitioner also co-authored and performed three songs on 1982's "Creatures of the Night" album, and, after leaving the band, co-authored another three songs for the KISS album "Revenge." Those songs are not at issue in this Petition.

royalties as his publisher's share, for a total 50% of the royalties commensurate with his 50% copyright ownership.

Beginning in 1982, Petitioner and KISS entered into a series of agreements regarding ownership of copyrights and royalties.[3] As relevant to the LIU compositions, the first applicable agreement is a December 8, 1983 employment agreement (the "1983 Employment Agreement"), which purports to govern Petitioner's and Respondents' rights concerning the LIU compositions. [Appellant's Supplemental Excerpts of Record ("ASE"), Tab 79, at 1533-37.][4] The 1983 Employment Agreement, paragraph 5(a), initially provided that KISS

> shall exclusively own and control one hundred percent (100%) of all right, title and interest, including the copyrights, all rights under such copyrights and all rights to the so-called "publisher's share" of income [from the LIU compositions]. All of the types of rights described in the preceding sentence are sometimes hereinafter referred to as the "Publishing Rights" * * *. You shall be entitled to your so-called "songwriter's share" of income derived from the [LIU compositions].

1983 Employment Agreement ¶ 5(a). [ASE Tab 79, at 1534.] That transfer of rights, however, was expressly conditioned

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[3] Over the course of this litigation there have been disputes as to precisely what agreements were actually executed. Respondents and the courts below have treated all of the relevant agreements as being validly executed. Without taking a position on such prior matters, this Petition will assume that each of the agreements was properly executed and binding, as such matters are not relevant to the issue presented herein.

[4] The record excerpts in the court of appeals had a number of volumes and supplements. The initial Appelant's Excerpts of Record will be abbreviated "AE." Appellant's Supplemental Excerpts of Record will be abbreviated "ASE." Appellees' Supplemental Excerpts of Record, in contrast, will be the less-abbreviated "Appellees' SE." All specific references will be to the Tab number of the section and bates number of the page of the relevant set of excerpts.

upon the timely payment, by a date certain, of the $50,000 purchase price, as provided in paragraph 5(b) of the agreement:

> Notwithstanding the foregoing [paragraph 5(a)], within twelve (12) months after the initial commercial release of the Current LP in the United States, * * * we must elect to either [reassign your rights to the LIU compositions or pay you $50,000]. In the event we make such [$50,000] payment to you prior to the expiration of such twelve (12) month period, we shall retain the Publishing Rights in your Lick It Up Compositions, in perpetuity. In the event we elect not to make such payment *or otherwise fail to make such payment prior to the expiration of such twelve (12) month period*, then the Publishing Rights in your Lick It Up Compositions shall be deemed to have been *automatically reassigned to you, ab initio* (i.e., just as if such Publishing Rights had, from creation of your Lick It Up Compositions, remained with you and subparagraph 5(a) had never been in effect) * * *. *In such latter event, you shall be entitled to receive all income attributable to the so-called "publisher's share" of your Lick It Up Compositions, whenever earned*, and we and you shall promptly enter into a co-publishing agreement [regarding the LIU compositions in the same form as a previous such agreement regarding a prior album] and * * * *we shall immediately pay over to you [your share of any] income theretofore received* and/or credited to us [for the LIU compositions] * * *.

Id. ¶ 5(b) (emphasis added). [ASE Tab 79, at 1535.]

Finally, the agreement incorporated such parts of an earlier employment agreement as were not inconsistent with the new agreement, including provisions providing a two-year period to object to royalty statements and rights to audit KISS's books and records in connection with royalty statements or payments. *Id.* ¶ 5(a). [ASE Tab 79, at 1534.]

In 1984 the parties entered into a Settlement Agreement to resolve various disputes that arose in connection with the 1983 Employment Agreement. The Settlement Agreement reaffirmed the relevant elements of the 1983 Employment Agreement, stated KISS's intent to exercise the purchase option contained in ¶ 5(b) of the Employment Agreement, and amended the required payment date for that option to September 19, 1984. [ASE Tab 79, at 1582-84.]

Despite Respondents' *intent* to exercise their purchase option for all the LIU composition rights other than Petitioner's 25% songwriter's share of royalties, Petitioner has consistently maintained that Respondents failed *in fact* to exercise that purchase option when they "otherwise fail[ed] to make such payment prior to" September 19, 1984. 1983 Employment Agreement ¶ 5(b) [ASE Tab 79, at 1535]; Complaint ¶¶ 51-53 [AE Tab 1, at 16-17].[5] Respondents thus forfeited their rights under ¶ 5(a) of the Employment Agreement and Petitioner's *full* 50% ownership rights (including copyright ownership and rights to his additional 25% publisher's share of royalties) thus automatically reverted to him on that date as if ¶ 5(a) "had never been in effect." 1983 Employment Agreement ¶ 5(b). [ASE Tab 79, at 1535.] Furthermore, because both parties failed thereafter to execute a co-publishing agreement, as they agreed to do in

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[5] While there seems to be no dispute that the required payment was not received in the time specified in the Settlement Agreement, Respondents may well have a different view of the consequences of a subsequent late payment by them. For the purposes of this Petition, however, it is immaterial whether the late payment was effective in retroactively exercising the purchase option, despite the lack of provision for curing a default in such exercise, or instead became a credit for royalties "immediately" due under ¶ 5(b) of the Employment Agreement. What *is* material to this Petition is that, after September 19, 1984, at worst Petitioner and Respondents had competing and inconsistent claims to ownership of the copyright and royalty interests of the LIU compositions. Petitioner, at a minimum, thus had a colorable claim to full ownership of his 50% co-author rights in the copyrights and the royalties for the LIU compositions.

¶ 5(b), no contract at all governed the LIU compositions, and the parties simply possessed the ordinary rights and reciprocal duties of co-authors under the Copyright Act.

2. In 1989 Petitioner declared Chapter 11 bankruptcy. Respondents Klein and Stanley, care of the KISS Company, were listed as creditors. In his schedule of assets, under the heading "Patents, copyrights, licenses, franchises, and other general intangibles," Petitioner included "songrights in * * * Songs written while in the band known as 'KISS.'" Respondents did not challenge that listing, did not assert any competing or conflicting interests in the asset, and ultimately raised no objection whatsoever to the "songrights" asset being included in the estate.

As part of the plan for reorganization, the songrights asset was specifically assigned back to Petitioner. The plan provided that, "[o]n confirmation, all assets of the Debtor's bankruptcy estate shall vest in Debtor," subject only to certain security interests for "Allowed" claims not relevant here. Confirmation Plan, Article 4.1(d). [ASE Tab 76, at 1497] The Plan further provided that "[a]ll executory contracts or unexpired leases of the Debtor which have not been specifically assumed by the Debtor as authorized by order of the bankruptcy Court * * * will be deemed rejected" and "Debtor is then released from all further liability and obligations" under such contracts. Article 5.1(a). [ASE Tab 76, at 1497-98] The reorganization plan did not make the songrights asset subject to any competing claims or limit it in any way by any purported rights of Respondents, and the plan did not make the rights subject to any prior agreements.

On September 17, 1990, the plan of reorganization was confirmed. The plan thus became final and binding on the Debtor and each Creditor, including Respondents, pursuant to 11 U.S.C. § 1141(a) (set forth *supra*, at 2). Petitioner thereafter emerged from bankruptcy with ownership of his songrights asset "free and clear of all claims and interests of

creditors," *id.* § 1141(c), including any claims or interests of Respondents here.

3. In July 1997, Petitioner filed suit against Respondents, seeking, *inter alia*, to recover royalties due him from the LIU compositions. Complaint. [AE Tab 1.][6] The Complaint alleged, *inter alia*, that KISS failed to make timely payment under the purchase option for the LIU compositions, that Petitioner's 50% copyright ownership and royalty rights thereby automatically reverted to him on September 19, 1984, and that a subsequent late attempt at payment represented royalties immediately due to Petitioner on account of that reverted ownership. Complaint ¶¶ 51-53. [AE Tab 1, at 16-17.] The Complaint further alleged that, following the reversion of rights in the LIU compositions, Respondents underpaid Petitioner his songwriter's share of royalties and failed to pay his reverted publisher's share of royalties at all. Complaint ¶¶ 54-55. [AE Tab 1, at 17.] Based on those and other facts, the Complaint raised a variety of claims relevant to the LIU compositions, including claims for an open book account for songwriter/publisher royalties, breach of fiduciary duty, fraud and deceit, misrepresentation, conversion, and imposition of a constructive trust. Complaint ¶¶ 180-263, 293-313. [AE Tab 1, at 37-48, 52-54.]

4. In December 1997, the district court dismissed without prejudice Petitioner's claims for royalties and other damages related to the LIU compositions and that were owed or incurred *prior* to March 21, 1989, the date Petitioner filed for bankruptcy. Pet. App. B5-B6 (Ninth Circuit description of procedural history).[7] The court held that such claims were not properly listed in the bankruptcy schedule of assets and that the "songrights" asset Petitioner did schedule was

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[6] The Complaint raised a variety of other claims and involved various songs from other albums as well. For the purposes of this Petition, however, only the claims relating to the LIU compositions are relevant.

[7] Those claims for pre-bankruptcy royalties are not at issue in this Petition.

undervalued. The court concluded that such claims and assets "would appear to belong to the estate," and hence could not be pursued by Petitioner without permission from the bankruptcy court. Pet. App. B6.

In February 1999, the district court dismissed *all* claims arising from pre-petition compositions, including the LIU compositions at issue here. Pet. App. B6. The district court held that because Petitioner's songrights asset remained the property of the bankruptcy estate, Petitioner lacked standing to assert claims based on such rights, including all claims for unpaid royalties, *accruing either pre- or post-petition*, from his pre-petition LIU compositions.

In December 1998, however, in an attempt to comply with the district court's initial suggestion that Petitioner seek permission from the bankruptcy court to pursue his claims, Petitioner filed a motion to reopen the bankruptcy proceedings. In opposing Petitioner's motion, Respondents conceded that, at the time Petitioner filed for bankruptcy in 1989, he "had a partial copyright ownership in certain musical compositions co-authored by [Petitioner] and recorded by KISS," specifically including the LIU compositions, and that at the time he filed for bankruptcy "he was aware" (as, presumably, were Respondents) "of his partial copyright ownership interest in the Pre-Bankruptcy Compositions." [ASE Tab 114, at 2029-30, 2045-46.] They offered a variety of reasons for not reopening the proceeding, however, including their inability to contest ownership of the songrights assets given the passage of time, the fading of witness memories, and the loss of documents. [ASE Tab 114, at 2043, 2051.]

In April 1999, the bankruptcy court denied Petitioner's motion to reopen, finding that because the estate was closed and the reorganization plan "fully consummated in 1993," it had no authority to allow Petitioner to amend the plan. Pet. App. B8.

In May 1999, the district court entered final judgment incorporating all of its prior dismissals and grants of summary judgment, noting that the bankruptcy court had refused to reopen Petitioner's bankruptcy. Pet. App. B8.

5. On appeal, the Ninth Circuit partially reversed the district court and reinstated Petitioner's claims as to the LIU compositions. The court started with the propositions that for Petitioner "to have standing, he, rather than the bankruptcy estate, must own the claim upon which he is suing," and that the "question of ownership turns on the validity and effect of Cusano's listing of his 'songrights' as an asset in his bankruptcy schedules." Pet. App. B9. The songrights asset was described in the bankruptcy schedule as "songrights in * * * Songs written while in the band known as 'KISS,'" a description the district court had found inadequate. The Ninth Circuit disagreed and found that description to be sufficient to put Creditors on notice:

> The "songrights" asset as described by Cusano can reasonably be interpreted to mean *copyrights and rights to royalty payments* for songs written for the band KISS pre-petition. * * * Although it would have been more helpful for Cusano to break down the description further * * *, the additional detail would not have revealed anything that was otherwise concealed by the description as it was, which provided inquiry notice to affected parties to seek further detail if they required it.

Pet. App. B12 (emphasis added).[8] The Ninth Circuit also rejected the claim that Petitioner's undervaluation of the

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[8] The relevance of such notice in the bankruptcy context, of course, is to provide Creditors an opportunity to challenge the ownership or valuation of scheduled assets or to assert competing claims to the assets prior to the bar date after which such challenges and claims will be lost. The effect of a proper listing of assets and subsequent confirmation of a plan providing for the reversion of such assets is to vest those assets in the Debtor and to bar, by *res judicata*, any competing claims by Creditors that were or could have been raised against those assets. 11 U.S.C. § 1141.

songrights provided an excuse for impairing his interest in them, absent an order of revocation after reopening the bankruptcy proceedings. *Id.*

The Ninth Circuit concluded "that Cusano sufficiently scheduled his 'songrights,'" Pet. App. B15, which, following confirmation of the reorganization plan, "vested in Cusano the rights to post-petition royalties on his pre-petition compositions and other damages accruing post-petition with respect to these pre-petition compositions," Pet. App. B13. As with the confirmation of the plan itself, the previous panel of the court of appeals never suggested that Petitioner's songrights were in any way subject to or limited by pre-petition claims or interests. Rather, the court held that because "[a]ll post-petition songright royalties are Cusano's property," he "retains standing to sue for any royalty payments coming due post-petition." Pet. App. B15-B16. The court therefore "reverse[d] the summary judgment in part and reinstate[d] Cusano's claims 1 through 5 for open book account, breach of fiduciary duty, fraud, and misrepresentation; and claims 9 and 10 for conversion and imposition of constructive trust, to the extent they seek post-petition royalties relating to pre-petition compositions, or other damages that arose post-petition." Pet. App. B15-B16.

6. On remand, despite what should have been a simple accounting of Petitioner's full post-petition royalty payments, including his concededly unpaid publisher's share, the district court once again granted summary judgment to Respondents. Ignoring the reversion of assets to Petitioner and the finality of the bankruptcy confirmation order as to competing claims on such assets, the district court instead revived the 1983 Employment Agreement as a limitation and encumbrance upon Petitioner's reverted songrights asset. Based on ¶ 5(a) of the 1983 Employment Agreement, and ignoring the failed (or at least disputed) exercise of KISS's purchase option under ¶ 5(b), the court held: that New York law governed Petitioner's claims for royalties, per a choice of law clause in

the Employment Agreement; that there was no mutual and open account between the parties under New York law; that a two-year limitation contained in the 1983 Employment Agreement barred any challenges to most past royalty statements; and that Petitioner had failed to establish damages in that there was no evidence that Respondents had not paid Petitioner his *songwriter's share* of royalties in accordance with the 1983 Employment Agreement.

As to Petitioner's conversion claim, the court held, contrary to the previous Ninth Circuit decision, that Petitioner did not *own* the copyrights or royalties and hence could not state a claim for conversion, as opposed to a simple breach of contract for the payment of royalties. Finally, on the various claims of fraud, constructive trust, and misrepresentation, the court held that because Respondents' obligations to Petitioner were defined by the pre-bankruptcy Employment Agreement they had only contractual, and not fiduciary, duties to Petitioner, and hence those claims, which depended on a fiduciary relationship, failed.

What each of those holdings had in common was the assumption that the 1983 Employment Agreement, and in particular ¶ 5(a) of that Agreement, defined and controlled the rights between the parties as to the LIU compositions, and that Petitioner had no more than a contractual right to his 25% songwriter's share of royalties, rather than his 50% copyright ownership of the LIU compositions under the Copyright Act, entitling him to 50% of the total royalties (a 25% songwriter's share *and* a 25% publisher's share).

7. Petitioner appealed to the Ninth Circuit, arguing, *inter alia*, that he owned his full 50% interest in the LIU compositions, that the bankruptcy and the previous Ninth Circuit decision confirmed his ownership as against any competing claims by Respondents, who were Creditors in that bankruptcy, and that the 1983 Employment Agreement therefore did not limit his rights. *See* Brief of Appellant, Feb. 27, 2004, at 6, 11-12, 15, 30; Reply Brief of Appellant, June

7, 2004, at 1-9, 15-16; Supplemental Brief for Plaintiff-Appellant, Apr. 6, 2005, at 2-3, 4, 6-7, 8-14, 22, 32, 41-42; Supplemental Reply Brief for Plaintiff-Appellant, June 1, 2005, at 1-7, 9-10.[9]

The Ninth Circuit affirmed in a brief unpublished opinion. Pet. App. A. Regarding the effect of the bankruptcy confirmation on Petitioner's ownership of his songrights in the LIU compositions, the court held that Petitioner "misreads our opinion in *Cusano* v. *Klein*, 264 F.3d 936 (9th Cir. 2001) (*"Cusano I"*), which held only that Cusano had standing to raise some of his claims. *Id.* at 945." Pet. App. A2. The court asserted, without analysis, that "*Cusano I* did not rule in favor of Cusano on the merits of any of his claims to royalty rights or copyrights, and did not invalidate any of the agreements between the parties." *Id.* The court then affirmed the district court's holdings as to Petitioner's claims concerning the LIU compositions, stating that the "district court was correct in applying the law of New York to Cusano's claim for an open book account," that such claim failed under New York law, and that Petitioner did not establish damages for his claims because he "had to produce evidence demonstrating inaccuracies in the accounting" but "'utterly failed' to carry this burden." Pet. App. A1-A2. The court thereafter claimed that the entire appeal was frivolous, and granted costs and attorney's fees. Pet. App. A2-A3.

8. On December 23, 2005, the Ninth Circuit denied rehearing and rehearing *en banc*. Pet. App. D. This petition for certiorari followed.

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[9] Petitioner also again noted that because KISS failed to make timely payment under the purchase option, his full 50% ownership rights automatically reverted to him in 1984, and hence the contract provisions relied upon by Respondents were of no effect in any event. *See, e.g.*, Supplemental Brief for Plaintiff-Appellant, Apr. 6, 2005, at 6. Any dispute over whether the purchase option was effectively exercised is precisely the type of claim that KISS was obliged to raise in the bankruptcy proceedings. No such claim was raised.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below, in allowing the revival of claims by former Creditors to encumber assets that reverted to a Debtor, ignores the clear *res judicata* effects of bankruptcy proceedings and thus erroneously resolves a matter "of importance in the administration of the Bankruptcy" laws. *New York* v. *Sapper*, 336 U.S. 328, 328 (1949) (explaining a reason why certiorari was granted). Central to bankruptcy law's fundamental policy of providing Debtors a fresh start are the finality and asset-reversion provisions of 11 U.S.C. § 1141 for Chapter 11 reorganizations. Those provisions bar any future claims by Creditors that were not accepted in the bankruptcy proceedings, and ensure the reorganized Debtor possession of any remaining estate assets "free and clear" of claims by Creditors.

The fundamental and plain error of the decision below is its holding, contrary to bedrock bankruptcy law, that Petitioner's "songrights" asset regarding the LIU compositions was impaired and limited by Respondents' unreserved claims on that asset under the pre-bankruptcy 1983 Employment Agreement. But, as of the purchase-option payment date of September 19, 1984, there was at worst a *dispute* concerning Respondents' rights under that Employment Agreement, and at best an unequivocal re-vesting of all relevant songrights in Petitioner. *See supra* at 6-7. By the time of Petitioner's bankruptcy in 1989, therefore, Respondents had, at most, a *disputed claim* to Petitioner's copyrights and publisher's share of royalties, and such a disputed claim is *precisely* the type of claim or objection that Respondents were obliged to raise in the bankruptcy proceedings. Having failed to assert that existing claim in the bankruptcy proceedings, Respondents were forever barred by *res judicata* from challenging the reversion of those assets, "free and clear," 11 U.S.C. § 1141(c), to Petitioner upon confirmation of the plan of reorganization.

While the current Petition does not involve a "split" as do many of this Court's cases, it does involve a ruling that is so clearly erroneous and unsupported that the Ninth Circuit may fairly be said to have "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision." SUP. CT. R. 10.1(a). The lack of a split in this case simply reflects that the decision below is *so far in error* that not a single other decision anywhere, including in the Ninth Circuit, can be found to support it, and every relevant precedent requires an opposite result. Alternatively, rather than spend the time to review this matter on full briefing, this Court should summarily reverse such plain error. SUP. CT. R. 16.1. Such a procedure is used regularly, though admittedly not frequently, to correct plain error in the courts of appeals and in the Ninth Circuit in particular.

I. THE DECISION BELOW FLAGRANTLY IGNORES CLEAR BANKRUPTCY LAW REGARDING OWNERSHIP OF ASSETS THAT HAVE REVERTED TO A DEBTOR AND THE *RES JUDICATA* BAR TO COMPETING CLAIMS ON THOSE ASSETS BY CREDITORS.

It is black-letter bankruptcy law that, for Creditors with proper notice, claims against the assets of an estate must be raised and accepted in the bankruptcy proceedings or be forever lost. *See* 11 U.S.C. § 1141(a) (confirmed plan binds Creditors). A confirmed reorganization plan constitutes a final judgment that is *res judicata* as to any claims that were *or could have been* raised in the bankruptcy proceedings. *See, e.g., In re PWS Holding Corp.*, 303 F.3d 308, 315-16 (CA3 2002) (Creditor with "opportunity to contest" Chapter 11 plan barred by confirmed plan from pursuing claims extinguished by plan; liable for costs associated with enforcing confirmation order against him), *cert. denied*, 538 U.S. 924 (2003); *Sure-Snap Corp.* v. *State Street Bank and Tr. Co.*, 948 F.2d 869, 873, 877 (CA2 1991) (citing 11 U.S.C. § 1141(a), noting

recognition by numerous courts of the "applicability of the time-honored principle of *res judicata* to confirmed, final bankruptcy hearings," and finding that prior bankruptcy order was a bar to claims "that could have been brought * * * but weren't" in the bankruptcy proceedings); *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (CA6 1991) (confirmation of plan of reorganization has "the effect of a judgment" and "res judicata principles bar relitigation of any issues raised or that could have been raised in the confirmation proceedings"); *Matter of Howe*, 913 F.2d 1138, 1143 (CA5 1990) (well-settled law that a Chapter 11 "plan is binding upon all parties once it is confirmed and all questions that could have been raised *pertaining to such plan* are res judicata") (emphasis in original); *cf. Stoll* v. *Gottlieb*, 305 U.S. 165, 170-71 (1938) (holding, regarding earlier analogous bankruptcy provisions, that "effect as *res judicata* is to be given" to an "adjudication under the reorganization provisions of the Bankruptcy Act"); *Duplessis* v. *Valenti (In re Valenti)*, 310 B.R. 138, 150 (CA9 BAP 2004) ("strong policy of finality" in analogous Chapter 13 context is the basis for "applying *res judicata* to confirmation orders").[10]

It is beyond dispute that Respondents, as Creditors in the bankruptcy proceedings, received proper notice of Petitioner's scheduling and asserted ownership, in a section specifically relating to "copyrights," of "songrights in * * * Songs written while in the band known as 'KISS.'" *See* App. B11. The 2001 Ninth Circuit decision in this case squarely

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[10] *See also In re Circle K Corp.*, 198 B.R. 784, 789 (Bankr. D. Ariz. 1996) ("Like final judgments, confirmed plans of reorganization are binding on all parties. Issues that could have been raised concerning the plan are barred by res judicata."); *In re Berryman Products, Inc.*, 183 B.R. 463, 467 (N.D. Tex. 1995) (for confirmed Chapter 11 plan, "all questions that could have been raised are foreclosed by *res judicata*"), *aff'd*, 91 F.3d 140 (CA5 1996); *In re Grimm*, 168 B.R. 102, 110 (Bankr. E.D. Va. 1994) (Chapter 11 plan confirmation is "'final judgment on the merits' for purposes of res judicata").

held that the songrights asset was adequately listed, encompassed Petitioner's unqualified interests in "copyrights and rights to royalty payments" for the LIU compositions, and Creditors were on notice and had an opportunity to investigate any claims they might have had concerning such assets. Pet. App. B12; *see also Maryland* v. *Antonelli Creditors' Liquidating Tr.*, 123 F.3d 777, 783 (CA4 1997) (bankruptcy orders binding on Creditors who received notice and opportunity to present their objections).

There likewise is no dispute that Respondents failed to challenge those assets or, indeed, to file any claims whatsoever in the bankruptcy proceedings. They never asserted ownership of Petitioner's copyrights or rights to his publisher's share of royalties from the LIU compositions, and they never raised or sought to preserve any contractual claims that would limit or encumber Petitioner's rights regarding the LIU compositions. Rather, Respondents approved the plan of reorganization without objection or reservation of any rights whatsoever.[11]

Given the lack of competing claims or reservations of rights, bankruptcy law is clear as a bell – the songrights assets

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[11] That is hardly surprising given that any competing rights or interests Respondents may have had in the LIU compositions lapsed in 1984, when Respondents failed to make timely payment to exercise their purchase option for the rights to the LIU compositions. *See supra* at 6-7. Indeed, even years later, Respondents admitted in their brief and affidavit to the bankruptcy court that Petitioner "had a partial copyright ownership" in the relevant copyrights and songrights going into bankruptcy. *See supra*, at 9. [ASE Tab 114, at 2029-30, 2045-46.] Such concession – a judicial admission that should bind Respondents, *cf. United States* v. *Bentson*, 947 F.2d 1353, 1356 (CA9 1991) (admission during oral argument), *cert. denied*, 504 U.S. 958 (1992) – is wholly at odds with any continued rights under ¶ 5(a) of the 1983 Employment Agreement that, if applicable, purports to give Respondents 100% copyright ownership. And it is likewise fatal to the conclusions below that Petitioner does not "own" the LIU copyrights and royalties due him, but merely has a *contractual* right to such royalties under the 1983 Employment Agreement. Pet. App. C11-C12.

reverted to Petitioner "free and clear" of competing claims by Creditors. 11 U.S.C. § 1141(c); *In re Regional Bldg. Systems, Inc.*, 254 F.3d 528, 531 (CA4 2001) (confirmation of Chapter 11 plan rendered property dealt with by plan "'free and clear of all claims' not expressly preserved").[12]

Absent any competing claim or agreement, the Copyright Act entitles Petitioner to an equal interest (50%) in the copyrights and associated royalty rights to the LIU compositions he co-authored, with each co-owner subject to an accounting for any profits to the other co-owner. *See Erickson* v. *Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (CA7 1994) ("In a joint work, the joint authors hold undivided interests in a work * * *. 17 U.S.C. § 201. Each author as co-owner has the right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits.") (citing *Childress* v. *Taylor*, 945 F.2d 500, 505 (CA2 1991); *Weinstein* v. *University of Illinois*, 811 F.2d 1091, 1095 (CA7 1987); 1 NIMMER ON COPYRIGHT, § 6.02, at 6-7 to 6-8.).

Based on Petitioner's unadulterated rights under the Copyright Act, he was clearly entitled to bring his claims for royalties, conversion, and various flavors of fraud given that he *owned* his full 50% share of the copyrights and the royalties for the LIU compositions. And once Petitioner's full 50% ownership interest in the copyrights and the royalty stream (25% songwriter's share *and* 25% publisher's share) are established, the *merits* of his claims are a foregone con-

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[12] *In re Cumberland Farms, Inc.*, 162 B.R. 62, 69 (Bankr. D. Mass. 1993) (Chapter 11 plan confirmation vests all property of estate in reorganized debtor unless otherwise provided in plan); *In re Chisolm*, 156 B.R. 336, 338 (Bankr. M.D. Fla. 1993) ("right of the Debtors to deal with the revested assets is circumscribed only by the terms of the confirmed Plan"); *United States* v. *Redmond*, 36 B.R. 932, 934 (D. Kan. 1984) (unless plan provides otherwise, "confirmation vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors") (citing 11 U.S.C. § 1141(b) & (c)).

clusion given that Respondents *concede* they never paid Petitioner his 25% publisher's share of the LIU royalties.

The arguments relied upon below in rejecting Petitioner's claims on the merits *all* assume that the pre-bankruptcy 1983 Employment Agreement continues to encumber and limit Petitioner's rights regarding the LIU compositions and give Respondents superior rights and interests in the LIU copyrights and royalties. But Respondents' claimed interests based on the 1983 Employment Agreement were not asserted, much less accepted, in the bankruptcy proceeding thus are barred by *res judicata*. *See supra*, at 15-16; *cf.* Pet. App. B14-B15 ("The only res judicata effect of [the bankruptcy court's denial of the motion to reopen the proceedings] is that the consequences of the prior closing will not be disturbed").[13] Reviving those claims now to block Petitioner's ownership of his reverted assets severely undermines the strong policy of finality that underlies the Bankruptcy Act. *Thomas* v. *RTC (In re Thomas)*, 184 B.R. 237, 240 (Bankr. M.D.N.C. 1995) (confirmation order and discharge are "critical elements of the fresh start that is afforded to debtors in the Bankruptcy Code," and it is essential that Debtors be allowed the benefit of rights and protections provided by plan); *see also Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (one of primary purposes of Bankruptcy Act is to permit Debtor "'to start afresh free from the obligations and responsibilities consequent upon business misfortunes'") (citation omitted).

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[13] Insofar as the 1983 Employment Agreement was an executory contract in 1989, it was further barred by Article 5.1(a) of the confirmed reorganization plan, which rejects all executory contracts that "have not been specifically assumed by the Debtor as authorized by order of the Bankruptcy Court." [ASE Tab 76, at 1497-98.] At a minimum, the mutual, yet unperformed, agreement in ¶ 5(b) of the 1983 Employment Agreement to enter into a further co-publishing agreement in the event the purchase option failed is plainly an executory agreement and hence there is *no agreement at all* governing the joint-authorship rights of the parties in that situation. The rights of the parties are thus governed by the Copyright Act alone.

Notwithstanding the preclusive effect of the bankruptcy in barring Respondents' competing claims to Petitioner's songrights in the LIU compositions, both the district court and Ninth Circuit erroneously revived Respondent's competing claims based on the pre-bankruptcy Employment Agreement in order to deny Petitioner his rights in his reverted songrights asset.

The only argument by the Ninth Circuit that even remotely touches upon the effect of the prior bankruptcy proceedings is the claim that Petitioner "misreads" the standing holding in *Cusano I*, which, according to the court of appeals, "did not rule in favor of Cusano on the merits of any of his claims to royalty rights or copyrights, and did not invalidate any of the agreements between the parties." Pet. App. A2.

But it is the court below that misunderstands the inevitable consequences of its earlier holding that Petitioner had standing because ownership of the songrights asset reverted to Petitioner upon confirmation of his Chapter 11 plan. That holding, admittedly made for purposes of standing, *necessarily* determined the central question concerning the scope and ownership of the songrights and *necessarily* triggered the inevitable bankruptcy-law consequences of the reversion of assets "free and clear" and the *res judicata* bar to competing claims. The proper scheduling of assets is the threshold event for such consequences, which follow as surely and certainly as night follows day. Regardless whether the prior Ninth Circuit panel expressly discussed those consequences, neither that panel nor the subsequent panel could avoid them.

Because the listing was sufficient to include both copyrights and rights to royalties, it imposed upon Respondents the obligation to raise or else forfeit any competing claims to those assets. Having failed to do so, Respondents could no longer raise disputed claims to those assets pursuant to a prior contract. The bankruptcy confirmation thus most certainly *did* "invalidate" ¶ 5(a) of the 1983 Employment Agreement

(assuming it even applied at all) insofar as claims based on that Agreement were barred by *res judicata*.

Each of the Ninth Circuit's grounds for rejecting Petitioner's claims regarding the LIU compositions thus improperly relies upon Respondents' competing pre-bankruptcy contractual claims that could have been, but were not, raised in the bankruptcy proceedings.

For example, the holding below that Petitioner failed to establish inaccuracies in the payment of royalties, and hence could not prove damages, Pet. App. A2, *assumes* that Petitioner's right to royalties is limited to a 25% "songwriter's share" under the 1983 Employment Agreement. But Petitioner's songrights are not so limited, and include an additional 25% publisher's share and an undivided 50% copyright ownership. A correct recognition of the *scope* of Petitioner's songrights thus establishes damages on its face. Respondents have never contended that they paid Petitioner his additional 25% publisher's share of royalties, and have only maintained that they properly accounted for the 25% songwriter's share. Even assuming the accuracy of their accounting, damages are still self-evident – Petitioner has, at a minimum, been denied the additional 25% publisher's share of royalties, and Respondents do not contend otherwise.[14] While they dispute any *obligation* to pay such royalties, they certainly do not dispute that *they have not paid* such additional royalties. The central question, therefore, is whether Petitioner is entitled to *only* a 25% songwriter's share under ¶ 5(a) of the 1983 Employment Agreement, or instead to 50% of total royalties

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[14] Furthermore, there was ample evidence in the Ninth Circuit that Respondents underpaid Petitioner even on the 25% songwriter's share of royalties that they concede they must pay. *See* Appellant's Motion For Judicial Notice and for Supplementation of Record, June 9, 2005, at 4-5 & Exh. B (providing newly received royalty statements from Respondent Polygram showing that as of 2005 Petitioner was still owed songwriter royalties on the LIU compositions dating back to 1989) (motion to supplement record granted by order dated Nov. 15, 2005).

based on his 50% copyright ownership entitling him to *both* his 25% songwriter's share *and* his 25% publisher's share. That question is answered definitively by the reversion of his songrights asset, free and clear, and the *res judicata* bar to competing claims against that asset. Those rights are not a function of any prior contracts, but rather of his joint ownership of the copyrights for the co-authored LIU compositions and the rights that inhere in such ownership pursuant to the Copyright Act. Had the court of appeals properly recognized such ownership, it would have been apparent and undisputed that Petitioner had been underpaid his royalties. Damages thus would not merely have been proven, they effectively would have been conceded.

The proper resolution of the bankruptcy issue likewise resolves the district court's rejection of the various claims alleging fraud and conversion. The district court disposed of numerous claims by holding that Respondents did not owe petitioner any fiduciary duties, but rather only contractual duties, the breach of which would not support claims for fraud. *See* Pet. App. C6-C11. (The Ninth Circuit affirmed the decision of the district court without commenting on that aspect of the decision.) Of course, in the absence of the 1983 Employment Agreement – hotly disputed in connection with the failed purchase option and barred by *res judicata* in any event – the only relationship between the parties is that of joint, undivided owners of the LIU copyrights, with a fiduciary duty to account to each other for any profits earned therefrom. Similarly, the district court's rejection of Petitioner's conversion claim on the basis that he "cannot establish * * * ownership," but merely a contractual right to royalties, Pet. App. C11-C12, fails for the same reason, and flatly contradicts the holding in the Ninth Circuit's prior decision in any event. *See* Pet. App. B15 ("[a]ll post-petition songright royalties are Cusano's property").

The plain error below deprived Petitioner of the very assets that the plan of reorganization assigned to him free and

clear, and thus severely undermined the plan itself and the bankruptcy laws governing such reorganizations. And the Ninth Circuit did so without even a pretense of reconciling its decision with the clear law governing bankruptcy plans. Given Respondents' failure to preserve their competing claims and objections during the bankruptcy proceedings, there is simply no legal means for them to raise such claims now, and the Ninth Circuit committed plain error in relying upon those competing contractual claims to deny Petitioner recovery on his reverted songrights asset.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO EITHER TAKE THIS CASE FOR FULL REVIEW OR SUMMARILY REVERSE THE DECISION OF THE NINTH CIRCUIT.

Petitioner recognizes that this case, involving unpublished plain error arising from the non-application of otherwise clear law, is not a typical candidate for full review by this Court. But the absence in this Petition of the more usual circuit "split" does *not* mean the Petition should simply be ignored. Rather, this Court should consider the Petition in light of its other less frequent but consistent bases for granting certiorari.

For example, this Court has granted certiorari in cases of importance to the administration of bankruptcy law or other significant federal statutes, even in the apparent absence of any split. *See Callaway* v. *Benton*, 336 U.S. 132, 136 (1949) (granting cert. in part because of the "importance of the question in the administration of the Bankruptcy Act"); *Maggio* v. *Zeitz*, 333 U.S. 56, 59 (1948) (this Court taking case "in view of its supervisory authority over courts of bankruptcy" and because procedures at issue were important to successful bankruptcy administration); *see also United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946) (cert. granted because case "raises questions of importance in the administration of" a large federal statute). Indeed, this Court has a history of granting even highly fact-bound cases where review was important to pre-

serving statutory rights from being undermined by the lower courts. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55 (1949) (granting cert. in an otherwise fact-bound case "because of the importance of preserving" statutory right to a jury trial under FELA).

This Court likewise occasionally grants petitions seemingly based solely on the error of the decision below, in the exercise of its supervisory function over the lower courts. *See Florida* v. *Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation."); *United States* v. *Hale*, 422 U.S. 171, 181 (1975) (undertaking highly fact-bound review and concluding, "in the exercise of our supervisory authority over the lower federal courts, that [defendant] is entitled to a new trial"); *City of Memphis* v. *Greene*, 451 U.S. 100, 102 (1981) (resolving highly fact-bound case on grounds that "record does not support" the decision below); *Montana* v. *Kennedy*, 366 U.S. 308, 309 (1961) (granting cert. "in view of the apparent harshness of the result" below); *Southern Constr. Co.* v. *Pickard*, 371 U.S. 57, 60 (1962) (granting cert. "to consider the applicability of [FED. R. CIV. P. 13(a)] in these unusual circumstances" and reversing); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 571 & n. 1 (1979) (granting cert. where courts below committed error in procedures used and out of "concern that the merits of these important questions had been decided erroneously"; citing Court's "power of supervision" as ground for review).

In the present case, the decision below both undermines the application of important provisions of bankruptcy law and renders a decision that is both profoundly wrong and harsh in result – effectively denying Petitioner ownership of property that reverted to him under his Chapter 11 plan. While this Petition thus indeed seeks error correction, it presents the sort of error this Court has on many occasions seen fit to correct.

Even if this Court, out of concern for its limited resources, were disinclined to consider full merits briefing and review in this case, it should nonetheless consider summary reversal in order to protect important bankruptcy law interests and to remedy a severe disservice to the administration of justice.

Supreme Court Rule 16.1 provides that this Court may resolve a petition for certiorari by issuing a "summary disposition on the merits." SUP. CT. R. 16.1. While not exactly *frequent*, summary dispositions (invariably reversals) occur quite *regularly*. During the current Term there already have been eight summary reversals (not counting a confession of error by the government).[15] Four of those eight summary reversals were of erroneous decisions of the Ninth Circuit, and four of eight also involved unpublished opinions in the courts of appeals (including two unpublished Ninth Circuit opinions). During this Court's 2004 Term there were four summary reversals, two of which were of Ninth Circuit deci-

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[15] *Gonzales* v. *Thomas*, 547 U.S. --, 126 S. Ct. 1613 (2006) (*per curiam*) (grant of cert. and summary reversal of *en banc* Ninth Circuit due to obvious error); *Ash* v. *Tyson Foods, Inc.*, No. 05-379, 546 U.S. --, 126 S. Ct. 1195 (2006) (*per curiam*) (granting cert. and vacating unpublished Eleventh Circuit decision due to error in standard applied); *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. --, 126 S. Ct. 1193 (2006) (*per curiam*) (granting cert. and summarily vacating decision of Ninth Circuit for error in failing to consider a critical legal issue underlying its decision); *Bradshaw* v. *Richey*, 546 U.S. --, 126 S. Ct. 602 (2005) (*per curiam*) (granting cert. and vacating decision of Sixth Circuit due to error); *Kane* v. *Garcia-Espitia*, 546 U.S. --, 126 S. Ct. 407 (2005) (*per curiam*) (granting cert. and reversing unpublished Ninth Circuit decision based on error); *Eberhart* v. *United States*, 546 U.S. --, 126 S. Ct. 403 (2005) (*per curiam*) (granting cert. and reversing Seventh Circuit decision based on error); *Schriro* v. *Smith*, 546 U.S. --, 126 S. Ct. 7 (2005) (*per curiam*) (granting cert. and vacating unpublished order of Ninth Circuit based on error in ordering state court trial); *Dye* v. *Hofbauer*, 546 U.S. --, 126 S. Ct. 5 (2005) (*per curiam*) (granting cert. and reversing unpublished Sixth Circuit decision based on error).

sions.[16] And during the 2003 Term there were five summary reversals, two of which were of Ninth Circuit decisions and two of which were of unpublished court of appeals decisions.[17] Over the current and two previous Terms, therefore, summary reversals account for between 5% and 14% of this Court's published dispositions on the merits (80 opinions each in OT 2003 and OT 2004, 56 opinions to date in OT 2005). And the Ninth Circuit accounts for a disproportionate 40% to 50% of such reversals. The average from OT 2003 to date is 7.9 % (17 out of 217) of merits opinions being summary reversals with 47% (8 out of 17) of those reversals coming from the Ninth Circuit. This Court thus is quite willing to use summary reversal as a more efficient alternative to full review in appropriate cases. And the Ninth Circuit seems particularly adept at providing such appropriate cases warranting summary reversal.

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[16] *Bell* v. *Cone*, 543 U.S. 447, 459-60 (2005) (*per curiam*) (granting cert. and reversing Sixth Circuit based on error in giving insufficient deference to prior state court decision); *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n. 3 (2004) (*per curiam*) (granting cert. and reversing Ninth Circuit decision "to correct a clear misapprehension of the qualified immunity standard"); *City of San Diego* v. *Roe*, 547 U.S. 77 (2004) (*per curiam*) (granting cert. and reversing Ninth Circuit decision based on fact-bound error); *Smith* v. *Texas*, 543 U.S. 37 (2004) (*per curiam*) (granting cert. and reversing Texas Court of Criminal Appeals based on error concerning jury instruction).

[17] *Holland* v. *Jackson*, 542 U.S. 649 (2004) (*per curiam*) (granting cert. and reversing unpublished Sixth Circuit decision based on error regarding fact-specific application of law); *Middleton* v. *McNeil*, 541 U.S. 433 (2004) (*per curiam*) (granting cert. and reversing Ninth Circuit decision based on error in evaluating particular jury instructions); *Illinois* v. *Fisher*, 540 U.S. 1174 (2004) (*per curiam*) (granting cert. and reversing seemingly unpublished Appellate Court of Illinois decision based on simple misapplication of law); *Mitchell* v. *Esparza*, 540 U.S. 12, 15 (2003) (*per curiam*) (granting cert. and reversing Sixth Circuit decision based on court having "failed to cite, much less apply," controlling statutory provision); *Yarborough* v. *Gentry*, 540 U.S. 1 (2003) (*per curiam*) (granting cert. and reversing Ninth Circuit decision based on fact-specific analysis of the objective adequacy of a closing argument by defense counsel).

The present case is yet another Ninth Circuit decision warranting such summary disposition by this Court. Indeed, it is the unusual one "in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (explaining situations in which summary reversal is appropriate). The only material facts are that Respondents' competing claims to the songrights in the LIU compositions existed at the time of the bankruptcy proceedings and were subject to ample dispute by Petitioner, the songrights asset was adequately listed in the bankruptcy schedule of assets, and Respondents failed in the bankruptcy proceedings to raise any claims or objections concerning that asset. Given those facts, the law regarding *res judicata* is settled and stable and the decision below reviving barred claims is clearly erroneous. Summary reversal thus is appropriate.

Finally, the fact that the decision below is unpublished is no barrier to summary reversal. Indeed, during the three Terms analyzed above, this Court summarily reversed six unpublished decisions and, it seems, the unpublished nature of those decisions and consequent lack of precedential force may well have been a reason they were disposed of summarily, rather than after full briefing and review.

Furthermore, that the Ninth Circuit failed to publish its decision here is just another reason to be suspicious of that decision. The use of unpublished decisions lacking precedential force has been criticized as being inconsistent with the judicial function. *See Anastasoff* v. *United States*, 223 F.3d 898, 899 (CA8) (R. Arnold, J.) ("We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the judicial."), *vacated as moot*, 235 F.3d 1054 (CA8 2000) (*en banc*). But an unpublished opinion also seems often to function as an excuse for less than rigorous analysis of the issues in a case. A panel's use of an unpublished opinion al-

lows it to ignore inconvenient precedent within the circuit or elsewhere, tends to insulate a decision from review by this Court by failing to generate a true "split," and can be a means of using purportedly fact-dependant rulings to undermine legal principles with which a court may disagree but lacks the power or an adequate justification to reject. *Cf.* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999) (use of unpublished opinions creates the "temptation" to ignore inconvenient precedent and "encourages" sweeping difficulties of a desired disposition "under the rug"). That the Ninth Circuit in *Hart* v. *Massanari*, 266 F.3d 1155 (CA9 2001), rejects Judge Arnold's views and strongly defends the use of unpublished opinions thus offers little comfort given the adverse incentives the mechanism of unpublished opinions provides.[18]

In praising a more open and candid approach by the Seventh Circuit, this Court has implicitly criticized decisions, much like this one, that "bur[y] the issue by proceeding in a summary fashion." *Eberhart* v. *United States*, 04-9949, 546 U.S. --, 126 S. Ct. 403, 407 (2005) (*per curiam*) (praising court of appeals for ruling squarely on an issue in a manner that "facilitated our review," and not "bur[ying] the issue by proceeding in a summary fashion").

In this case the court of appeals simply buried an erroneous ruling in an unpublished opinion and sought to call it a day. This Court should not reward such an approach by writ-

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[18] It is particularly ironic and unjust that the Ninth Circuit used a published precedential opinion to correctly *establish* Petitioner's ownership of the LIU copyrights and royalty streams, but then resorted to an unpublished opinion to confirm the district court's flat contradiction of that earlier holding. *Compare* Pet. App. B15 (post-petition royalties are Petitioner's "property"), *with* Pet. App. C11-12 (Petitioner cannot establish "ownership" of royalties). That treatment simply avoids having to reconcile the results of the non-precedential second decision with the precedential holding of the first decision by effectively sweeping the difficulty under the rug.

ing off the decision given its unpublished status, but instead should view the decision with greater skepticism and, in an appropriate case such as this, resolve the Petition by summary reversal. In particular, this Court should hold that *res judicata* bars Respondents from relying on pre-bankruptcy claims and interests under the 1983 Employment Agreement that they failed to raise in the bankruptcy proceedings. The decision of the Ninth Circuit thus should be summarily reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 22, 2006

APPENDICES

APPENDIX A

153 Fed.Appx. 998, 2005 WL 3046418

United States Court of Appeals,Ninth Circuit.

Vincent CUSANO, individually d/b/a Vinnie Vincent Music, d/b/a Streetbeat Music f/k/a Vinnie Vincent, Plaintiff-Appellant,

v.

Gene KLEIN, an individual; Stanley Eisen, an individual; The Kiss Company, a New York Corporation; Gene Simmons Worldwide Inc., a Delaware Corporation; Simstan Music Ltd., a Delaware Corporation; Kisstory Ltd.; Polygram Records, Inc., a Delaware Corporation; Horipro Entertainment Group, a California Corporation; Paul Stanley, Defendants-Appellees.

No. 03-56650.

Argued and Submitted Aug. 5, 2005.
Decided Nov. 15, 2005.

Before: KOZINSKI and RAWLINSON, Circuit Judges, and EZRA,* District Judge.

MEMORANDUM**

1. The district court was correct in applying the law of New York to Cusano's claim for an open book account. New

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* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

York law does not recognize a cause of action for an open book account. *See Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 460 N.Y.S.2d 552, 556 (N.Y.App.Div.1983). Nor does Cusano's account qualify as "mutual, open and current," as it lacks both openness and mutuality. *See Rodgers v. Roulette Records, Inc.*, 677 F.Supp. 731, 735 (S.D.N.Y.1988).

2. Cusano misreads our opinion in *Cusano v. Klein*, 264 F.3d 936 (9th Cir.2001) (*"Cusano I"*), which held only that Cusano had standing to raise some of his claims. *Id.* at 945. *Cusano I* did not rule in favor of Cusano on the merits of any of his claims to royalty rights or copyrights, and did not invalidate any of the agreements between the parties. To defeat appellees' summary judgment motion on remand, Cusano had to produce evidence demonstrating inaccuracies in the accounting. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Cusano "utterly failed" to carry this burden. *See Cusano v. Klein*, 280 F.Supp.2d 1035, 1040 (C.D.Cal.2003). Thus, summary judgment was properly granted on all claims.

3. The district court offered Cusano multiple opportunities over several years to conduct discovery. Given Cusano's repeated failure to do so, it did not abuse its discretion by finally closing all discovery. *See United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir.2002).

4. Cusano's right of publicity claim, and the grant of attorney's fees associated with it, are not properly before us. These issues were already decided in *Cusano I*. *See* 264 F.3d at 951. Raising these issues again in this appeal is frivolous. *See* Fed. R.App. P. 38; *Wilcox v. C.I.R.*, 848 F.2d 1007, 1009 (9th Cir.1988).

5. Cusano's entire appeal is frivolous, *see* Fed. R.App. P. 38; "the result is obvious [and] the arguments of error are wholly without merit." *Wilcox*, 848 F.2d at 1009. Further,

Cusano has repeatedly misrepresented the facts of the case to this court. *See Malhiot v. S. Cal. Retail Clerks Union,* 735 F.2d 1133, 1138 (9th Cir.1984). For example, Cusano states that his claims regarding the "Creatures Compositions" were dismissed without prejudice, when in fact they were dismissed with prejudice. *Compare* Appellant's Supp. Br. at 16 *with* Appellees' SER Ex. 117, p. 3029. Cusano also states that his claims regarding the "Revenge Compositions" were dismissed "solely as a discovery sanction," when in fact *Cusano I* affirmed their dismissal on the merits. *Compare* Appellant's Supp. Br. at 8 *with Cusano I,* 264 F.3d at 950-51, 951 n. 6. Similar falsities are littered throughout Cusano's filings.

Appellees' motion for sanctions against Cusano is therefore granted. The case is referred to the Appellate Commissioner who is authorized to enter judgment against Cusano, compensating appellees for reasonable costs and fees they have incurred in defending this appeal.

AFFIRMED; MOTION FOR SANCTIONS GRANTED.

APPENDIX B

264 F.3d 936

United States Court of Appeals, Ninth Circuit.

Vincent CUSANO, individually d/b/a Vinnie Vincent Music, d/b/a Streetbeat Music f/k/a Vinnie Vincent, Plaintiff-Appellant,

v.

Gene KLEIN, an individual; Stanley Eisen, an individual; The Kiss Company, a New York Corporation; Gene Simmons Worldwide, Inc., a Delaware Corporation; Simstan Music Ltd., a Delaware Corporation; KISStory Ltd.; Polygram Records, Inc., a Delaware Corporation, Defendants-Appellees,

And Horipro Entertainment Group, a California Corporation, Defendant.

Vincent Cusano, individually d/b/a Vinnie Vincent Music, d/b/a Streetbeat Music f/k/a Vinnie Vincent, Plaintiff-Appellant,

v.

Gene Klein, an individual; Stanley Eisen, an individual; The Kiss Company, a New York Corporation; Gene Simmons Worldwide, Inc., a Delaware Corporation; Simstan Music Ltd., a Delaware Corporation; KISStory Ltd.; Polygram Records, Inc., a Delaware Corporation; Horipro Entertainment Group, a California Corporation, Defendants-Appellees.

Nos. 00-55536, 99-56131.

Argued and Submitted Feb. 6, 2001

Filed Sept. 6, 2001

Before: PREGERSON, CANBY, and THOMPSON, Circuit Judges.

CANBY, Circuit Judge:

Vincent Cusano, individually and under certain professional and business names, brought this diversity action against persons and companies associated with the famous rock'n'roll band KISS, alleging various claims for unpaid royalties, defamation, and infringement of his right of publicity. Cusano appeals the district court's grant of summary judgment in favor of Defendants. In his companion appeal, No. 00-55536, which we consolidate for purposes of decision, Cusano challenges the district court's award of attorney's fees and costs. We have jurisdiction pursuant to 28 U.S.C. § § 1291 and 2106, and we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Vincent Cusano, professionally known as Vinnie Vincent, is a professional musician, songwriter and publisher, and former lead guitarist of the rock'n'roll band KISS. Cusano, individually and under his business names Streetbeat Music and Vinnie Vincent Music, brought this diversity action in July 1997 against persons and companies associated with KISS. Cusano alleged fourteen causes of action, including claims for unpaid royalties from songs Cusano coauthored and performed for the band, and claims for defamation and infringement of his right of publicity arising from the release of two videos and a book about KISS.[1] Two of the central questions raised by the appeal concern the effect of

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[1] Cusano's claims were: (1) open book account-songwriter/publisher royalties; (2) breach of fiduciary duty; (3) fraud and deceit; (4) constructive fraud; (5) negligent misrepresentation; (6)-(8) fraud and deceit; (9) conversion; (10) imposition of constructive trust; (11) breach of contract; (12) open book account-artist royalties; (13) infringement of right of publicity; and (14) defamation.

Cusano's Chapter 11 bankruptcy on his royalty-related claims, and the effect of the statutes of limitations on his defamation and right-of-publicity claims.

The "KISS Defendants" include: The KISS Company, successor in interest to KISS; Paul Stanley and Gene Klein a/k/a Gene Simmons, individual members of the band; KISStory, Ltd., a corporation that merchandises a book about KISS; and Gene Simmons Worldwide, Inc. and SimstanMusic, Ltd., companies that administer copyright interests of band members. Other Defendants include: Polygram Records, Inc., publisher of certain songs co-authored by Cusano; and Horipro Entertainment Group, purported assignee of certain royalty rights to certain KISS compositions.

Cusano was the lead guitarist for KISS from 1982 until 1984, during which time Cusano co-authored and performed three songs for the 1982 KISS album "Creatures of the Night" and eight songs for the 1983 KISS album "Lick It Up." KISS and Cusano's publishing company, Streetbeat Music, executed co-publishing agreements in 1982 and 1984 covering these compositions, agreeing to share royalties evenly. Polygram allegedly administered the collection and distribution of royalties for KISS. Cusano alleges that KISS failed to honor certain provisions of the co-publishing agreements, and improperly exercised an option to purchase certain of Cusano's songrights, causing KISS wrongfully to receive and later assign to Horipro a portion of Cusano's rightful share of the royalties.

Cusano declared Chapter 11 bankruptcy in 1989. On the schedule for personal property, he listed "songrights in ... Songs written while in the band known as 'KISS,' " which he assigned a value of "unknown." Defendants Simmons and Stanley were listed as creditors possessing contingent and disputed claims in an unknown amount. Cusano's reorganization plan provided for a cash payment to the plan of $40,000, generally, and another cash payment of $1,521.60 to

retain his songrights. The plan was confirmed in 1990 and Cusano was released from bankruptcy in 1993.

In 1992, although no longer a member of the band, Cusano co-authored three songs for the KISS album "Revenge." Cusano alleges that he never received royalties for the "Revenge" compositions because Defendants Klein and Stanley fraudulently attached a photocopy of his signature to an agreement purporting to assign his interest in the compositions to Gene Simmons Worldwide, Inc. and SimstanMusic, Ltd. Also in 1992, Cusano assigned part of his royalty rights in the "Creatures of the Night" compositions to Horipro, after which Horipro allegedly directed Polygram to pay Horipro more than its rightful share.

In 1994, the coffee-table book entitled "KISStory" was published, allegedly pursuant to a merchandising agreement between KISS and other non-parties for the production and distribution of an "authorized" and "limited edition" picture book about the rock band. Cusano alleges that his right of publicity was infringed because the book contains numerous photographs of Cusano that were utilized without his permission. Cusano further alleges that the book contains a defamatory reference to Cusano. His defamation claim also includes alleged defamatory statements that were published in two KISS videos released in 1987 and 1992.

Cusano filed the present action in July 1997 against KISS, individual band members, Polygram, and Horipro, in which he alleged claims for breach of fiduciary duty, fraud and deceit, constructive fraud, negligent misrepresentation, conversion, imposition of constructive trust, breach of contract, infringement on the right of publicity, defamation, and open book account for royalties.[2]

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[2] An open book account is a detailed statement that constitutes the principal record of the transactions between the creditor and debtor arising out of a contract or fiduciary relationship. The statement details the debits

In December 1997, in response to Defendants' Rule 12(b)(6) and other motions, the district court transferred or dismissed several claims, in whole or in part. First, the district court severed all claims against Horipro and transferred them to the Southern District of New York, thereby removing from the case all of claim 7 for fraud and parts of claims 9 and 10 for conversion and imposition of constructive trust. Second, the district court applied California statutes of limitations to dismiss claims 2 through 5 for breach of fiduciary duty, fraud, and misrepresentation, to the extent that they arose before July 1994; claims 9 and 10 for conversion and imposition of constructive trust, to the extent that they arose before July 1997; claim 11 for breach of contract, to the extent that it arose before July 1993; and claim 14 for defamation, to the extent that it arose before July 1996.

Third, the district court dismissed entirely claims 6 and 8 for fraud, because Cusano failed to allege the reliance element and cited no authority allowing him to bring a claim for fraud upon a fiduciary. Fourth, as a consequence of dismissing claim 8 for fraud, brought against Klein, Stanley, Gene Simmons Worldwide, Inc., and SimstanMusic, Ltd., the district court dismissed claims 9 and 10 for conversion and imposition of constructive trust with respect to those same Defendants. Fifth, the district court dismissed in part claim 14 for defamation, holding that two of the four alleged defamatory statements are non-defamatory as a matter of law.

Finally, having previously taken notice of Cusano's Chapter 11 bankruptcy, the district court dismissed without prejudice all claims for royalties on the "Creatures of the Night" and "Lick It Up" compositions ("pre-petition compositions") which should have been paid prior to March 21, 1989 or for other damages which were incurred prior to March 21, 1989, the date Cusano filed his petition. The court found that Cu-

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and credits in connection with the debtor/creditor relationship. *See* Cal.Code Civ. Proc. § 337a.

sano had failed to schedule his claims for royalties and that the "songrights" asset he did schedule was vastly undervalued. Finding that these unscheduled claims "would appear to belong to the estate," the court informed Cusano that he could not proceed with these claims without first obtaining permission from the bankruptcy court. This ruling on Defendants' December 1997 motions resulted in at least partial dismissal of each of Cusano's fourteen claims.

In September 1998, with a new judge presiding over the case, the district court granted Defendants' motion for summary judgment on claim 11 for breach of contract, dismissing it in its entirety. The district court found that Cusano could not maintain this claim, in which he sought payment of artist's royalties for his performances with KISS, because he was not a member of the American Federation of Musicians ("AFM") during the time in which he was a member of the band, and thus had no standing to sue for breach of the AFM Labor Agreement.

In November 1998, with Cusano having yet to petition the bankruptcy court to release his claims, KISS Defendants and Polygram moved for summary judgment on all claims arising from pre-petition compositions. The district court granted the motion in February 1999, possibly unaware that Cusano had since moved the bankruptcy court in December 1998 to reopen his bankruptcy case. The district court held that Cusano lacked standing to assert claims based on facts and transactions predating his bankruptcy, including all claims for unpaid royalties, accruing either pre or post-petition, from his pre-petition compositions. In accordance with this holding and summary judgment, the district court partially dismissed Cusano's claims for open book account (1st claim), breach of fiduciary duty (2nd claim), fraud and deceit (3rd claim), constructive fraud (4th claim), negligent misrepresentation (5th claim), conversion (9th claim), and imposition of constructive trust (10th claim).

Also in February 1999, the district court on its own motion dismissed Cusano's claim for infringement of his right of publicity (13th claim), and granted Defendants' motion for summary judgment on the defamation claim (14th claim). The court found that Cusano had admitted in his opposition to Defendants' motion for summary judgment that the right of publicity claim was based on pre-petition facts. The remaining portion of his defamation claim was dismissed as barred by the statute of limitations. These rulings resulted in the dismissal of these two claims in their entirety.

At this point in the proceedings, most of Cusano's remaining claims involved his post-petition "Revenge" compositions. KISS Defendants and Polygram moved for summary judgment in January 1999 on the ground that Cusano had been paid all sums due and owing. Cusano countered by alleging that his signature on agreements in which he purportedly assigned his interest in the "Revenge" compositions had been forged. The district court appointed a forensic examiner in March 1999 to determine the authenticity of the "Revenge" agreements. The court ordered Cusano either to submit a handwriting analysis report from the neutral examiner or to withdraw his dispute of the agreements and submit his opposition to the motion for summary judgment, limiting his arguments to the use of the "Revenge" compositions on the KISS album "Alive III" and two KISS videos. When Cusano failed to comply with the order by filing nothing, the court held that the "Revenge" agreements were valid and binding on Cusano and granted summary judgment for KISS Defendants and Polygram. This ruling resulted in the dismissal of all remaining portions of Cusano's claims 1 through 5 for open book account, breach of fiduciary duty, fraud, and misrepresentation; and claims 9 and 10 for conversion and imposition of constructive trust.

Meanwhile, Cusano's bid to reopen his bankruptcy case was unsuccessful. In April 1999, after a hearing at which KISS Defendants and Polygram also appeared, the bank-

ruptcy court denied Cusano's December 1998 motion to reopen. The court stated that it would not reconsider the district court's findings that "any claims for unpaid royalties on prepetition musical compositions did not revert to debtor and that such claims were never formally abandoned to debtor." The court also stated that, "[a]ll claims based on facts predating Debtor's bankruptcy, including claims for unpaid royalties on pre-petition musical compositions remain assets of the estate, and the Estate is Closed." Finally, because the reorganization plan was "fully consummated in 1993," the bankruptcy court found that it had no authority to allow Cusano to amend the plan. Cusano missed his deadline to appeal the decision to the Bankruptcy Appellate Panel.

In May 1999, the district court rendered final judgments on all of its prior dismissal orders and summary judgment rulings. The final judgment also disposed of the only claim not entirely disposed of by its prior orders-claim 12 for open book account-noting that it was effectively dismissed when the court dismissed claim 11 for breach of contract in September 1998. Noting that the bankruptcy court had refused to reopen Cusano's bankruptcy, the court went on to dismiss all fourteen claims for relief in their entirety with prejudice. From this ruling, and the award of attorney's fees and costs, Cusano appeals.

DISCUSSION

I. Pre-Petition Compositions

Cusano contends that the district court erred in granting summary judgment dismissing for lack of standing all of his claims concerning his interests in pre-petition compositions.[3] We agree, in part. For Cusano to have standing, he, rather than the bankruptcy estate, must own the claim upon which he is suing. The question of ownership turns on the validity

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[3] We review de novo the district court's grant of summary judgment. *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir.1999) (en banc).

and effect of Cusano's listing of his "songrights" as an asset in his bankruptcy schedules. We conclude that Cusano's scheduled "songrights" asset reverted to him upon the confirmation of his reorganization plan-by technical abandonment and by express provision of the plan-and vested in him all post-petition royalty rights to his pre-petition compositions, despite his probable undervaluation of the songrights. He thus reacquired ownership of all claims to royalties derived from these compositions post-petition, but not claims for unpaid pre-petition royalties, which were required to be scheduled separately as either receivables or legal claims. Thus, we reverse the district court in part, and reinstate some of Cusano's royalty claims.

An "estate" is created when a bankruptcy petition is filed. *See* 11 U.S.C. § 541(a); *In re FitzSimmons*, 725 F.2d 1208, 1210 (9th Cir.1984). Property of a bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." § 541(a)(1). This broad category includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." § 541(a)(6). Thus, post-petition revenues belong to the estate to the extent they are based on pre-petition services or agreements. *See, e.g., In re Jess*, 215 B.R. 618, 621 (B.A.P. 9th Cir.1997); *In re Wu*, 173 B.R. 411, 414-15 (B.A.P. 9th Cir.1994); *Rau v. Ryerson*, 739 F.2d 1423, 1425 (9th Cir.1984). Accordingly, Cusano's future royalties from his pre-petition "Creatures of the Night" and "Lick It Up" compositions became assets of his bankruptcy estate. *See In re Dillon*, 219 B.R. 781, 784 (Bankr.M.D.Tenn.1998); *Waldschmidt v. CBS, Inc.*, 14 B.R. 309, 311-12 (M.D.Tenn.1981). In addition, assets of the estate properly included any of Cusano's causes of action. *See Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 708 (9th Cir.1986). The question presented here is

what happened to these assets of the estate during and after their administration in bankruptcy.

Two separate sections of the bankruptcy code govern reversion of assets of the bankruptcy estate to the debtor. The first provision, which applies to all forms of bankruptcy, including Chapter 11, is the technical abandonment provision: "Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title." 11 U.S.C. § 554(c). The second provision is unique to Chapter 11 bankruptcies, and sets forth the effect of confirmation: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." *Id.* § 1141(b).

The bankruptcy code placed an affirmative duty on Cusano to schedule his assets and liabilities. *Id.* § 521(1). If he failed properly to schedule an asset, including a cause of action, that asset continues to belong to the bankruptcy estate and ***946** did not revert to Cusano. *See Stein v. United Artists Corp.*, 691 F.2d 885, 893 (9th Cir.1982) (holding that only property "administered or listed in the bankruptcy proceedings" reverts to the bankrupt); *accord Hutchins v. IRS*, 67 F.3d 40, 43 (3d Cir.1995); *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir.1991) (holding that property is not abandoned by operation of law unless the debtor "formally schedule[s] the property before the close of the case").

"[T]he debtor has a duty to prepare schedules carefully, completely, and accurately." *In re Mohring*, 142 B.R. 389, 394 (Bankr.E.D.Cal.1992); *accord In re Jones*, 134 B.R. 274, 279 (N.D.Ill.1991); *In re Baumgartner*, 57 B.R. 513, 516 (Bankr.N.D.Ohio 1986); *In re Mazzola*, 4 B.R. 179, 182 (Bankr.D.Mass.1980). Although there are "no bright-line rules for how much itemization and specificity is required,"

Cusano was required to be as particular as is reasonable under the circumstances. *In re Mohring*, 142 B.R. at 395. If possible, Cusano was to list the "approximate dollar amount" of each asset. *See In re Wenande*, 107 B.R. 770, 772 (Bankr.D.Wyo.1989). If faced with a range of values, he was to "choose a value in the middle of the range." *In re Seruntine*, 46 B.R. 286, 288 (Bankr.C.D.Cal.1984). There are assets, however, the value of which is unknown; when that is the case, "a simple statement to that effect" will suffice. *In re Wenande*, 107 B.R. at 772.

Generally, "mistakes in valuation will not enable a trustee to recover an abandoned asset," *Hutchins*, 67 F.3d at 44, not even upon "subsequent discovery that the property has a greater value than previously believed." *In re McGowan*, 95 B.R. 104, 106 (Bankr.N.D.Iowa 1988); *accord In re DeVore*, 223 B.R. 193, 197 (B.A.P. 9th Cir.1998) (recognizing the "general rule that abandonment is irrevocable"). Revocation of abandonment is appropriate, however, where "the trustee is given incomplete or false information of the asset by the debtor, thereby foregoing a proper investigation of the asset." *In re Ozer*, 208 B.R. 630, 633 (Bankr.E.D.N.Y.1997); *accord In re Adair*, 253 B.R. 85, 89 (B.A.P. 9th Cir.2000); *In re DeVore*, 223 B.R. at 198. The cases that contemplate such action, however, indicate that the revocation may be effected only by express order after the reopening of the bankruptcy case. *See, e.g., In re Ozer*, 208 B.R. at 631; *In re Adair*, 253 B.R. at 88-89; *In re DeVore*, 223 B.R. at 198.

Cusano's listing was not so defective that it would forestall a proper investigation of the asset. Cusano scheduled "songrights in ... Songs written while in the band known as 'KISS.' " He listed their value as "unknown." His reorganization plan called for him to retain ownership of his "songrights." In a memo to the bankruptcy court, Cusano listed "songrights" as an asset being retained under the plan and listed its value as $1,521.60. He then noted that, in addition to $40,000 he had "already set aside ... to pay creditors," he

would "contribute cash representing the value of these songrights in the amount of $1,521.60." He concluded by noting that these amounts constitute "a fresh contribution which greatly exceeds the value of the property interest he is retaining."

The "songrights" asset as described by Cusano can reasonably be interpreted to mean copyrights and rights to royalty payments for songs written for the band KISS pre-petition. The debtor in *In re Dillon* described a similar asset on her bankruptcy schedules as "songwriter's share of songs." 219 B.R. at 783. Although it would have been more helpful for Cusano to break down the description further so that it named songs, albums, and dates of and parties to royalty and copyright agreements, the additional detail would not have revealed anything that was otherwise concealed by the description as it was, which provided inquiry notice to affected parties to seek further detail if they required it. Any undervaluation of the "songrights" asset does not impair Cusano's interest in it, because only an express order of revocation after reopening of the bankruptcy case would do so, and that did not occur.[4] *See In re Adair*, 253 B.R. at 88-89; *In re Ozer*, 208 B.R. at 631.

We conclude, therefore, that his listing of the "songrights" asset was a sufficient scheduling of Cusano's interest in his pre-petition compositions, which reverted to him upon confirmation of his plan. The reversion vested in Cusano the rights to post-petition royalties on his pre-petition compositions and other damages accruing post-petition with respect to these pre-petition compositions. The district court erred when it applied to Cusano's case the general rule that post-petition revenues based on pre-petition services or agreements belong to the bankruptcy estate. *In re Dillon*, 219 B.R. at 784. The rule is simply not applicable here, because the ac-

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[4] The actual value of Cusano's future royalties under the songrights is not clear from the record.

tual pre-petition service or agreement at issue in this case, "songrights," reverted to Cusano's ownership.

Unpaid pre-petition royalties and other damages which accrued pre-petition, on the other hand, did not revert to Cusano with the "songrights" asset, because these were subject to a separate scheduling requirement as accrued causes of action. Causes of action are separate assets which must be formally listed. *Vreugdenhill*, 950 F.2d at 526. Simply listing the underlying asset out of which the cause of action arises is not sufficient. *See id.* at 525 (stating that debtor who scheduled parts as an asset failed properly to list a cause of action for failure to accept those parts).

Cusano contends that his royalty claims for pre-petition compositions involved an open book account, *see* Cal.Code Civ. Proc. § 337a, and thus no legal claim accrued until the entry of the last item, *see* § 337, well after his bankruptcy. We reject this contention. It is true that, generally, a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy. *Brassfield v. Jack McLendon Furniture, Inc.*, 953 F.Supp. 1424, 1433 (M.D.Ala.1996); *Erickson v. Baxter Healthcare*, 94 F.Supp.2d 907, 912-13 (N.D.Ill.2000). To determine when a cause of action accrues, we look to state law. *In re Folks*, 211 B.R. 378, 384 (B.A.P. 9th Cir.1997). It is important, however, to distinguish principles of accrual from principles of discovery and tolling, which may cause the statute of limitations to begin to run after accrual has occurred for purposes of ownership in a bankruptcy proceeding. *In re Swift*, 129 F.3d 792, 796, 798 (5th Cir.1997).

We conclude that Cusano's open book account claim accrued for bankruptcy purposes to the extent that sums were owed on that account at the time he filed his petition. An action could have been brought for those sums at that time. Our conclusion is not affected by the fact that limitations on such an action had not yet begun to run. An action for open book account in California must commence within four years

of the entry of the last item on the account. *See* Cal.Code Civ. Proc. § 337. Cusano's alleged open book account*948 with Defendants has been open for years, and could continue to remain open for years to come. Cusano cannot avoid disclosing on his bankruptcy schedules a claim for an unpaid royalties balance, which was ascertainable and collectible when he filed his petition, simply because this claim does not accrue for statute of limitations purposes until the royalties dry up or payment is refused. Thus, if there was any outstanding balance due Cusano on the open book account when he filed for bankruptcy, he was under a duty to schedule it as a receivable or as a cause of action for unpaid royalties. His failure to do so vests the claim in the bankruptcy estate, where it remains.[5] The district court's decision that Cusano could not sue on his open book account claims was accordingly correct with regard to any sums owing at the time of petition. But Cusano retains standing to sue for any royalty payments coming due post-petition.

Finally, we reject Defendants' contention that the doctrine of res judicata bars Cusano's appeal of the district court's decisions concerning standing, because of the bankruptcy court's ruling that it would not reopen Cusano's bankruptcy nor reconsider the district court's findings. "The doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered a final judgment on the merits of the claim in a previous action involving the same parties or their privies." *In re Int'l Nutronics, Inc.*, 28 F.3d 965, 969 (9th Cir.1994). The bankruptcy court simply denied Cusano's motion to reopen. The only res judicata effect of this denial is that the consequences of the prior closing will not be

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[5] Cusano had no duty to disclose a cause of action for post-petition royalties due on his pre-petition compositions, because those royalties had not accrued at the time of his petition. He had a duty to disclose other causes of action, such as those for fraud and deceit, to the extent that they had accrued at the time of his petition, and Cusano makes no argument to the contrary.

disturbed. Just as the mere reopening of a bankruptcy case is a ministerial act that "lacks independent legal significance and determines nothing with respect to the merits of the case," *see In re Menk*, 241 B.R. 896, 913-17 (B.A.P. 9th Cir.1999), the mere refusal to reopen a bankruptcy case similarly has no impact on the property of the debtor or the estate. Any reference to the findings of the district court here was simply a statement that the bankruptcy court would not interfere with those findings. The district court made findings with regard to the consequences of the prior closing, and those findings, undisturbed by the bankruptcy court, are what are before us on appeal.

In sum, we conclude that Cusano sufficiently scheduled his "songrights," which vested in him upon confirmation of his Chapter 11 reorganization plan. Any undervaluation was not fatal, absent some sort of action in the bankruptcy court. All post-petition songright royalties are Cusano's property because he retains the "songrights" asset. Accordingly, we reverse the summary judgment in part and reinstate Cusano's claims 1 through 5 for open book account, breach of fiduciary duty, fraud, and misrepresentation; and claims 9 and 10 for conversion and imposition of constructive trust, to the extent they seek post-petition royalties relating to pre-petition compositions, or other damages that arose post-petition. Unpaid royalties that arose pre-petition, however, were subject to scheduling and should have been listed as either a receivable or as an existing cause of action. Because they were not scheduled, they remain dormant in the bankruptcy estate. The same result follows for all royalty-related claims, such as those for breach of fiduciary duty, fraud, and conversion, which arose pre-petition. We affirm the judgment of the district court with regard to these claims that had accrued by the time of the bankruptcy petition.

II. Defamation

The district court dismissed Cusano's defamation claim on the ground that it was barred by the one-year statute of limitations. Cal.Code Civ. Proc. § 340(3). It is undisputed that the alleged defamatory statements, made in the video "KISS X-Treme Close-Up" and the book "KISStory," were published in their only editions in 1992 and 1995, respectively. Under the Uniform Single Publication Act, Cusano's claim accrued on the first general distribution of the video and the book to the public. Cal. Civ.Code § 3425.3. Cusano contends that the book and video were "republished" under an exception to the Uniform Single Publication Act, and also that the "rule of discovery" should be applied in this case to toll the statute of limitations, because he did not discover the defamatory statements until January 1997, six months before he brought suit. We reject these contentions, and affirm the district court's grant of summary judgment on the defamation claim.

No exception to the Uniform Single Publication Act applies here to save Cusano's defamation claim. All printings, over time, of the first hardcover edition of a book constitute a single publication. *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1028 (9th Cir.1983). In contrast, the republication of a hardcover book in paperback gave rise to a new defamation claim in *Kanarek v. Bugliosi*, 108 Cal.App.3d 327, 333, 166 Cal.Rptr. 526 (1980), because the paperback form "was undoubtedly intended to and did reach a new group of readers." Cusano would extend *Kanarek* to cases where the same publication is marketed through different media, or sold at different forums, because each change of venue is an effort to reach a new audience. Although the policy reasons underlying the holding in *Kanarek* may promise broader application, *Kanarek* itself provided the rule (cited in *Fleury*) which governs this case: "all copies of the hardbound first edition of the book [give] rise to *one cause of action*." *Kanarek*, 108 Cal.App.3d at 332, 166 Cal.Rptr. 526

(emphasis added). Cusano offers no authority to support treating video sales differently.

Neither does the "rule of discovery" apply here to toll the statute of limitations. A defamation claim "accrues upon the first general distribution of the publication to the public." *McGuiness v. Motor Trend Magazine*, 129 Cal.App.3d 59, 61, 180 Cal.Rptr. 784 (1982). Generally, the "statute of limitations will begin to run regardless of whether a plaintiff is aware that he has a cause of action." *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal.App.3d 880, 896, 118 Cal.Rptr. 370 (1974). Exceptions to this rule will be made in cases of fraudulent concealment, *McGuiness*, 129 Cal.App.3d at 63, 180 Cal.Rptr. 784, and in cases where the plaintiff could not have reasonably discovered the facts giving rise to his claim, *Schneider v. United Airlines, Inc.*, 208 Cal.App.3d 71, 77, 256 Cal.Rptr. 71 (1989). Neither exception applies here. The district court correctly ruled that Cusano's defamation claim was time-barred.

III. Infringement of the Right of Publicity

The district court dismissed, on its own motion, Cusano's claim for infringement of the right of publicity, on the ground that Cusano admitted that the claim was based on pre-bankruptcy facts and transactions and thus his standing to pursue the claim had to first be resolved by the bankruptcy court. We do not decide whether the district court erred in holding that Cusano should have scheduled his rights and interests in all photographs taken of him pre-bankruptcy, because we affirm on a separate ground-namely, that the statute of limitations bars this claim.

The subject of this claim is the book KISStory, published in January 1995. Under the single-publication rule, limitations began to run at that time. The statute of limitations for infringement of the right of publicity in California is two years. *See* Cal.Code Civ. Proc. § 339; *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 854, 160 Cal.Rptr. 323, 603 P.2d 425

(1979) (dissenting opinion) (noting that neither party on appeal challenged trial court's determination of two-year statute of limitations for infringement of right of publicity). Cusano did not commence the present action until July 1997, well after the two-year statute of limitations had run. For the same reasons discussed above with respect to Cusano's defamation claim, neither the "rule of discovery" nor any exception to the Uniform Single Publication Rule saves this claim. It is time-barred.

IV. Post-Petition ("Revenge") Compositions

The district court dismissed Cusano's claims for unpaid royalties on his "Revenge" compositions after (1) construing the "Revenge" agreements as valid and binding on Cusano because he failed timely to respond to a court order requiring a report on handwriting analysis and a supplemental opposition; and (2) granting Defendants' motion for summary judgment after deeming Cusano's failure to file a timely opposition to constitute consent to the granting of the motion. Cusano contends that a significant disputed issue of fact exists regarding whether he signed the "Revenge" agreements, and thus summary judgment was improper. We reject this contention and affirm, but do so on the strength of only one of the rulings of the district court.

The district court's summary judgment cannot be sustained solely on the ground that Cusano failed to file the supplemental opposition papers, permitting entry of judgment under Local Rule 7.9. A " 'local rule that requires the entry of summary judgment simply because no papers opposing the motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with Rule 56, [and] hence impermissible under Rule 83.' " *United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 464 (9th Cir.1999) (quoting *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir.1993)). We may affirm summary

judgment, however, on any ground supported by the record. *Olson v. Morris,* 188 F.3d 1083, 1085 (9th Cir.1999).

We conclude that summary judgment was appropriate because the district court properly construed the "Revenge" agreements against Cusano, thus leaving no genuine dispute of material fact with respect to the "Revenge" claims. According to the agreements submitted by Defendants, Cusano assigned all his rights to the "Revenge" compositions. The district court held the agreements valid and binding against Cusano because he failed to submit a timely handwriting analysis report and, alternatively, because he failed to file an opposition to Defendants' summary judgment motion. Cusano eventually submitted a version of the "Revenge" agreements that the district court admittedly could not reconcile with the Defendants' version, but he did so only after all relevant deadlines had passed. We interpret the district court's refusal to reassess its earlier grant of summary judgment to Defendants as a decision to strike Cusano's late-submitted evidence for failure to comply with a scheduling order. We review that ruling for abuse of discretion. *Munoz v. Orr,* 200 F.3d 291, 303 (5th Cir.2000). Because Cusano inexcusably neglected to respond to the district court's order requiring him to act, the district court did not abuse its discretion by refusing to weigh Cusano's late-submitted evidence at summary judgment.[6]

Accordingly, we affirm the district court's grant of summary judgment on claims 1 through 5 for open book account, breach of fiduciary duty, fraud, and misrepresentation; and claims 9 and 10 for conversion and imposition of constructive trust, to the extent that they are based on the "Revenge" compositions.

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[6] We also find no fault with the district court's ruling that, insofar as the claim was unaffected by the Revenge agreements, Cusano had presented no competent evidence of damages.

V. Fees Appeal

The district court awarded attorney's fees only with respect to the right of publicity claim, pursuant to Cal. Civ.Code § 3344. The fees were awarded to those KISS Defendants involved in the right of publicity claim, and to Polygram. Cusano appeals that ruling, and the award of costs, in companion appeal No. 00-55536, which we consolidate with the merits appeal No. 99-56131 for purposes of decision. Because we affirm the district court's ruling dismissing the right of publicity claim, we affirm the district court's award of attorney's fees. The KISS Defendants involved in the right of publicity claim and Polygram remain "prevailing parties" under Cal. Civ.Code § 3344 and thus they are entitled to attorney's fees.

Costs, on the other hand, were awarded to all Defendants in the district court, pursuant to Federal Rule of Civil Procedure 54(d)(1) and Central District Local Rule 16.1, and were not limited to the right of publicity claim. Because we have reversed the district court's grant of summary judgment to several Defendants on several claims in the merits appeal, we vacate all awards of costs and remand for a new determination of costs after other proceedings on remand.[7]

CONCLUSION

For the foregoing reasons, we reverse the summary judgment on all claims related to the pre-petition compositions to the extent that they seek unpaid royalties that became payable after the filing of the bankruptcy petition or other damages that accrued post-petition. In all other respects, we affirm the

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[7] Defendants contend that the district court's judgment inadvertently failed to include its award of costs, and have moved in this court to have the judgment corrected. In light of our disposition of the merits appeal, we deny the motion as moot. After proceedings on remand a new judgment, with a new assessment of costs, will be entered.

judgment of the district court on the merits of Cusano's claims.

With respect to the companion fees appeal, we affirm the award of attorney's fees to Defendants who remain "prevailing parties" on the claim for infringement of right of publicity after our decision on the merits. We vacate all awards of costs, however, because we reverse summary judgment on several claims in the merits appeal.

The parties will bear their own costs in the merits appeal, No. 99-56131. Defendants are entitled to their costs in the fees appeal, No. 00-55536.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

280 F. Supp.2d 1035

United States District Court,

C.D. California, Western Division.

Vincent CUSANO, et al., Plaintiff(s),

v.

Gene KLEIN, et al., Defendant(s).

No. CV 97-4914-AHM(EX).

Aug. 20, 2003.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

MATZ, District Judge.

INTRODUCTION

This matter is before the Court on Defendants' Motion for Summary Judgment on Plaintiff's second, third, fourth, fifth, ninth, and tenth claims for breach of fiduciary duty, fraud, constructive fraud, negligent misrepresentation, conversion, and imposition of constructive trust. For the reasons elaborated below, Defendants' motion is GRANTED.[1]

MOTION STANDARDS

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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[1] On August 11, 2003, the Court Clerk provided a draft of this Order to the parties via facsimile. The deadline to request a hearing was August 18, 2003. Neither party requested a hearing.

material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248, 106 S.Ct. 2505. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence***1038** which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir.2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 805-06, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999) (*citing Celotex*, 477 U.S. at 322, 106 S.Ct. 2548).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Fed.R.Civ.P. 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.; Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." ' *Hunt v. Cromartie*, 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (quoting *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted).

BACKGROUND

Unless otherwise noted, the following facts are undisputed. Plaintiff in this action, Vincent Cusano, was employed by the musical group "KISS" as a guitarist and songwriter, from around April 1982 to April 1984. Klein Decl. ¶ 2. Cusano entered into a written employment agreement with KISS, a partnership, on September 23, 1982. Plaintiff's Separate Statement of Genuine Issues ¶ 1 ("SGI"). The parties agreed that the agreement would be governed by New York law. Klein Decl., Ex. A at 18 ("Agreement"). In December 1983, Defendant KISS Company ("KISS Co."), the KISS partnership's successor in interest, entered into an agreement with Cusano ("Employment Agreement"), SGI ¶ 2, that incorporated by reference the terms of the September 1982 agreement. Agreement at 4. The Employment Agreement gave KISS Co. one hundred percent ownership rights of

Cusano's compositions on the "Lick it Up" album ("Compositions"). *Id.* at 5. In return, Cusano was entitled to his "songwriter's share" of income derived from the worldwide exploitation of the Compositions. *Id.* The Employment Agreement also provided for KISS Co. to render quarterly accounting statements to Cusano. *Id.* at 8. Since around September 1984, Defendant Polygram Records, Inc. ("Polygram")***1039** has rendered quarterly accounting statements directly to Cusano for his share of "domestic mechanical" royalties. Rogers Decl. ¶ 3. It appears that KISS Co. may have rendered accounting statements to Cusano before that time, and continued to render accounting statements to him after Polygram began to do the same. *See* Vail Decl. ¶ 4.

Cusano commenced this suit in July 1997. As a result of prior rulings, his remaining claims apply only to the "Lick it Up" Compositions. The thrust of his allegations is that Defendants have improperly accounted for the royalties due him, contrary to their representations that they would faithfully administer the royalty account.

ANALYSIS

A. Summary Judgment Is Warranted Because of the Burden of Proof

Generally, the plaintiff in a civil case has the burden of proving all the elements of her cause of action. 57 N.Y. Jur.2d *Evidence and Witnesses* § 163. Cusano argues, however, that Defendants have the burden of proving that they properly accounted for the royalties due him. Opp. at 2. Since they have this burden, he argues, "their failure to offer any such evidence compels the denial of their summary judgment motion." *Id.* He relies on a California case, *Wolf v. Superior Court*, 107 Cal.App.4th 25, 130 Cal.Rptr.2d 860 (2003), involving an author's right to allegedly unpaid royal-

ties from a film and television production company.[2] The *Wolf* court held in dicta that in cases of "contingent compensation ... where essential financial records are in the exclusive control of the defendant who would benefit from any incompleteness, public policy is best served by shifting the burden of [proving satisfaction of its payment obligation] to the defendant." 107 Cal.App.4th at 35, 130 Cal.Rptr.2d 860. Notably, the author in that case had attempted to exercise his right to audit the production company's records, but each time the defendant had failed to provide access to the pertinent records. *Id.* at 28, 130 Cal.Rptr.2d 860.

New York courts as well have held that "it is generally inappropriate to place the burden of proof on a party in [a] case where the facts governing the resolution of the controversy are within the exclusive knowledge of the opposing party." *Johnson v. City of New York*, 302 A.D.2d 463, 756 N.Y.S.2d 67, 69 (N.Y.App.Div.2003) (citations omitted). However, various factors play a role in the decision to shift the burden of proof from the party pleading a cause of action. 5 N.Y. Practice Series *Evidence in New York State and Federal Courts* § 3.2. These factors include fairness, practicality and convenience, access to evidence, and policy considerations. *Id.*

Cusano's argument that Defendants have the burden of proving that they properly accounted to him is unpersuasive. The Employment Agreement gave Cusano an audit right to verify the accuracy of his royalty statements. Agreement at 2. Unlike the *Wolf* plaintiff, Cusano has never exercised this audit right, even in the last six years since he commenced this action to recover the allegedly unpaid royalties. Vail Decl. ¶ 5; Rogers Decl. ¶ 5. Cusano has proffered no evidence

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[2] Although the Employment Agreement is governed by New York law, California law can be instructive, especially in view of Southern California's large entertainment industry and the many disputes that California courts adjudicate between artists and record or film companies.

showing that he even attempted to audit Defendants' accounting records and was refused. Although Defendants are in possession of the records, it cannot be said that Cusano has no access to the evidence given his contractual*1040 audit right. Moreover, shifting the burden of proof when Cusano chose to ignore his audit right would result in unfairness, and would reward irresponsible and derelict conduct. In this case, it is appropriate to leave the burden of proving all the elements of his claims exactly where New York law places it-on Cusano.[3]

Defendants are entitled to summary judgment on all six claims because Cusano has failed to show genuine issues for trial. Each of his claims is premised on Defendants' allegedly false royalty statements, but he has utterly failed to produce any evidence whatsoever of inaccuracies in the accounting, other than his own declaration that Defendants have never confirmed to him whether the sums reflected in his statements are accurate. Cusano Decl. ¶ 2. In fact, Cusano's opposition largely attempts to demonstrate that his various claims "are properly stated." That is not the proper standard on a summary judgment motion. Moreover, each of his claims fails for the additional reasons elaborated below.

B. Cusano's Claim for Breach of Fiduciary Duty

Cusano must first prove that Defendants owed him a fiduciary duty before he can establish a breach of that duty. *See Weiss, Peck & Greer v. Robinson*, 2003 WL 1396436, at *5 (S.D.N.Y. Mar.19, 2003). Courts applying New York law have routinely refused to recognize a fiduciary relationship between artists and the companies obligated to publish or license their works and pass on royalties. *See, e.g., Arnold Productions, Inc. v. Favorite Films Corp.*, 298 F.2d 540, 542 (2nd Cir.1962) (agreement between motion picture owner and

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[3] Even in *Wolf* the Court noted that "the availability of evidence" to the plaintiff is a factor to consider in determining whether the normal allocation of the burden of proof should be altered. 107 Cal.App.4th at 35, 130 Cal.Rptr.2d 860.

distributor, giving distributor the exclusive right to exploit films and requiring it to pay a percentage of revenues to the owner, was not a fiduciary relationship, but one of "simple contract"); *Sony Music Entertainment Inc. v. Robison,* 2002 WL 272406 at *3 (S.D.N.Y. Feb.26, 2002) (contract between record company and recording artists that provided for the record company to collect royalties and pass them on to the artists did not create a fiduciary relationship between the parties) (citing *Rodgers v. Roulette Records,* 677 F.Supp. 731, 739 (S.D.N.Y.1988); *Archie Comic Publications, Inc. v. DeCarlo,* 141 F.Supp.2d 428, 432-33 (S.D.N.Y.2001)); *Cooper v. Sony Records Int'l,* 2001 WL 1223492 at *5 (S.D.N.Y. Oct.15, 2001). Instead, courts have characterized the relationship between the parties as a purely commercial, arms-length business transaction. *See Robison,* 2002 WL 272406 at *3; *Rodgers,* 677 F.Supp. at 739.

California law is in accord. In *Wolf,* the plaintiff assigned to Walt Disney Pictures and Television ("Disney") the rights to his novel and the character upon which the novel was based, while Disney agreed to pay the plaintiff royalties. 107 Cal.App.4th at 28, 130 Cal.Rptr.2d 860. The court, affirming dismissal of the plaintiff's breach of fiduciary duty claim, held that "the contractual right to contingent compensation in the control of another has never, by itself, been sufficient to create a fiduciary relationship where one could not otherwise exist." *Id.* at 31, 130 Cal.Rptr.2d 860. Moreover, the fact that the plaintiff reposed his trust and confidence in Disney to properly account for royalties did not create a fiduciary relationship. *Id.; Robison,* 2002 WL 272406 at *3. "Every contract requires one party to repose an element of trust and confidence in the ***1041** other to perform." *Wolf,* 107 Cal.App.4th at 31, 130 Cal.Rptr.2d 860.

Accordingly, KISS Co.'s contractual duty to collect royalties, account for them and pass them on to Cusano did not create a fiduciary relationship. Similarly, when Polygram began rendering accounting statements to Cusano in Septem-

ber 1984, it did not have, or thereby create, a fiduciary relationship with him. Cusano argues, however, that Defendants are his fiduciaries because the Employment Agreement includes more than just an obligation to collect and account for royalties-it includes a provision giving KISS Co. power of attorney:

> You [Cusano] hereby irrevocably appoint us [KISS Co.] as your true and lawful attorney-in-fact to execute, verify, acknowledge and deliver any and all instruments or documents which you shall fail or refuse to execute, verify, acknowledge or deliver to effectuate the intent of this agreement or any of the terms and conditions thereof.

Agreement at 8; Opp. at 3. Cusano is correct that an attorney-in-fact is an agent owing fiduciary duties to his principal. *See* 2A N.Y. Jur.2d *Agency and Independent Contractors* § 63 (2003). Like other written instruments, however, a power of attorney should be construed according to the plain and reasonable meaning of its words, and neither restricted nor enlarged. *Benderson Development Co. v. Schwab Bros. Trucking, Inc.*, 64 A.D.2d 447, 409 N.Y.S.2d 890, 896 (N.Y.App.Div.1978); 2A N.Y. Jur.2d *Agency and Independent Contractors* § 73.

In this case, the provision does not make KISS Co. Cusano's attorney-in-fact in all matters. KISS Co. is his attorney-in-fact, and therefore his fiduciary, only for the limited purpose of executing documents that he fails or refuses to execute and that are necessary to effectuate the intent of the Employment Agreement. *See* Restatement (Second) of Agency § 13 (2003) ("An agent is a fiduciary with respect to matters within the scope of his agency"). Cusano alleges that Defendants breached their fiduciary duty in rendering inaccurate royalty statements and payments. Compl. ¶ 199. He cannot now enlarge the scope of KISS Co.'s agency to say that it is his fiduciary for these purposes. The act of render-

ing payments does not at all implicate KISS Co's power of attorney to execute documents on behalf of Cusano. Moreover, Polygram does not have even a limited fiduciary relationship with Cusano because it was not a party to the Employment Agreement and did not agree to act as his attorney-in-fact. *See* Agreement at 4-8; see this Court's 9/15/98 Order at 12 (granting Polygram's Motion for Summary Adjudication on Cusano's eleventh claim for breach of contract).

For the foregoing reasons, Defendants are entitled to summary adjudication on Cusano's breach of fiduciary duty claim.

C. Cusano's Claims for Constructive Fraud and Imposition of Constructive Trust

In order to recover damages for constructive fraud, Cusano must prove as one element the existence of a confidential or fiduciary relationship with Defendants. *Franco v. English,* 210 A.D.2d 630, 620 N.Y.S.2d 156, 160 (N.Y.App.Div.1994); *Del Vecchio by Del Vecchio v. Nassau County,* 118 A.D.2d 615, 499 N.Y.S.2d 765, 768 (N.Y.App.Div.1986). To impose a constructive trust, Cusano also must establish a confidential or fiduciary relationship. *Sharp v. Kosmalski,* 40 N.Y.2d 119, 386 N.Y.S.2d 72, 75, 351 N.E.2d 721 (1976); *Cooper,* 2001 WL 1223492 at *5.

Cusano does not have claims for either constructive fraud or constructive trust against Polygram because he does not have a fiduciary relationship with it. As stated above, Polygram did not agree ***1042** to act as his attorney-in-fact. Cusano has proffered no evidence that Polygram has even a contractual relationship with him. His arms-length business relationship with the record company simply will not support these claims. *See Rodgers,* 677 F.Supp. at 739 (recording artist did not have a claim for constructive trust against his record company because no fiduciary relationship existed between the parties); *Cooper,* 2001 WL 1223492 at *6 (same).

Neither does Cusano have claims for constructive fraud or constructive trust against KISS Co. He argues that "Defendants are liable to [him] for constructive fraud to the extent they have improperly accounted to him as fiduciaries." Opp. at 4. Similarly, Cusano argues that "[i]f Defendants have in fact breached their fiduciary duties owed to [him], the remedy [of constructive trust] is appropriated [sic]." *Id.* at 5. But KISS Co. was not his fiduciary in accounting for royalties, nor did it breach a fiduciary duty if it improperly accounted for royalties. Thus, KISS Co. cannot be held liable as a fiduciary for these acts.

D. Cusano's Claims for Fraud and Negligent Misrepresentation

To establish a claim for fraud, one element Cusano must prove is Defendants' knowing misrepresentation of material fact. *Salles v. Chase Manhattan Bank*, 300 A.D.2d 226, 754 N.Y.S.2d 236, 239 (N.Y.App.Div.2002). In order to establish a claim for negligent misrepresentation, Cusano need prove that Defendants negligently made a materially misleading or false representation. *See Balaber-Strauss v. N.Y. Telephone (In re Coin Phones, Inc.)*, 203 B.R. 184, 200 (Bankr.S.D.N.Y.1996).

A fraud claim fails when it merely states an alleged breach of contractual duties and does not concern representations that are collateral or extraneous to the parties' contract. *Sforza v. Health Ins. Plan of Greater New York*, 210 A.D.2d 214, 619 N.Y.S.2d 734, 736 (N.Y.App.Div.1994); *Robison*, 2002 WL 272406 at *2. The same is true of claims for negligent misrepresentation. *See Fourth Branch Assocs. Mechanicville v. Niagara Mohawk Power Corp.*, 235 A.D.2d 962, 653 N.Y.S.2d 412, 415 (N.Y.App.Div.1997); *Best Payphones, Inc. v. Empire State Payphone Assoc.*, 272 A.D.2d 139, 708 N.Y.S.2d 11, 12 (N.Y.App.Div.2000). "It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the

contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 516 N.E.2d 190 (N.Y.1987).

Cusano cannot maintain his claims for fraud and negligent misrepresentation against KISS Co. because they merely state a breach of contractual duties. The Employment Agreement entitled Cusano to his songwriter's share of income derived from the exploitation of the Compositions. Agreement at 5. The thrust of his claims for fraud and negligent misrepresentation is that Defendants falsely represented the amount of royalties due him. Compl ¶ ¶ 212, 246. The claims against KISS Co. do not involve representations collateral or extraneous to the Employment Agreement.

The allegations against Polygram are not based on or derivative of a breach of contract because Polygram was not a party to the Employment Agreement. 9/15/98 Order at 12. Nevertheless, as stated above, the claims fail because Cusano has not provided evidence that Polygram misrepresented a material fact, either knowingly or negligently, by rendering inaccurate accounting statements.

***1043 E. Cusano's Claim for Conversion**

In his claim for conversion, Cusano must prove (1) that he had "legal ownership of a specific identifiable piece of property" and (2) Defendants exercised dominion over it in defiance of his rights. *Di Siena v. Di Siena*, 266 A.D.2d 673, 698 N.Y.S.2d 93, 95 (N.Y.App.Div.1999) (quotation omitted); *ESI, Inc. v. Coastal Power Prod. Co.*, 995 F.Supp. 419, 433 (S.D.N.Y.1998) (plaintiff had cause of action for conversion of money, but he had to prove that he had ownership, possession, or control of the money before its conversion). Cusano's claim for conversion cannot be maintained if it is "predicated on a mere breach of contract." *MBL Life Assurance Corp. v. 555 Realty Co.*, 240 A.D.2d 375, 658 N.Y.S.2d 122, 124 (N.Y.App.Div.1997); *ESI, Inc.*, 995 F.Supp. at 433.

In *Rodgers*, the court found that a record company was not liable for conversion to a recording artist who asserted claims for allegedly unpaid royalties. 677 F.Supp. at 736-37. The court found that the record company owned the artist's recordings and merely held the proceeds from sales of its own property, "part of which [it] was contractually obligated to pass onto [the artist] in the form of royalties." *Id.* at 736. Additionally, the court found that the artist could not assert his conversion claim because it merely stated a breach of contractual rights. *Id.* at 737.

Defendants are entitled to summary judgment since Cusano cannot establish that he has ownership rights in the royalties allegedly due him. KISS Co. "exclusively own[s] and control[s] one hundred percent (100%) of all right, title and interest [in the Compositions], including the copyrights, all rights under such copyrights, and all rights to the so-called 'publisher's share' of income derived from the worldwide exploitation of such copyrights." [4] Agreement at 2. As in *Rodgers*, KISS Co. held the proceeds from the sale of its own property, the Compositions. When Polygram took over administration of the royalty account, the proceeds were still the property of KISS Co. Cusano never had possession or control of the proceeds; he was only entitled to his songwriter's share in the form of royalties. Moreover, Cusano's conversion claim is predicated on a breach of contractual duties.

F. Contractual Limitation Period

Even if Cusano's claims had survived summary judgment, they would be subject to a two-year contractual limitation period. The Employment Agreement gives him two years to object to royalty accounting statements in writing. *Id.* at 2,

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[4] Compare this to the September 1982 agreement between KISS Co. and Cusano regarding the compositions on the album, "Creatures of the Night." This states that the parties "shall jointly own an undivided fifty (50%) interest in the Compositions, including all of the worldwide right, title, and interest." Klein Decl. ¶ 5, Ex. B at 48.

34. If he does not, the statements "shall constitute an account stated as to all royalties due for the period covered by such statement." *Id.* at 34.

Similar agreements shortening the statute of limitations for a claim have been approved by the New York Court of Appeals. In *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 415 N.Y.S.2d 785, 389 N.E.2d 99 (N.Y.1979), the contract between the parties provided that a claim based upon the contract must be commenced within six months after final payment for services rendered. 46 N.Y.2d at 548, 415 N.Y.S.2d 785, 389 N.E.2d 99. The court found that this contractual limitations provision did not conflict with public policy, "but, in fact, more effectively secure[d] the end sought to be attained by the statute of limitations." *Id.* at 551, ***1044**415 N.Y.S.2d 785, 389 N.E.2d 99 (quotation omitted).

By filing this action in July 1997, Cusano effectively provided written objection to the accounting statements provided by Defendants. He had not objected at any time before. Vail Decl. ¶ 5; Rogers Decl. ¶ 5; *see* Opp. at 6. Thus, his claims would be limited to those statements rendered on or after July 1995, two years before he objected.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment[5] is GRANTED. Defendants have filed a Proposed Judgment including the award of attorney's fees "for prevailing on Cusano's claim for violation of the right of publicity under California Civil Code section 3344." Before the Court enters that Proposed Judgment, each side shall file a memorandum (not to exceed three pages) setting forth the basis for its respective contentions as to whether such fees may be awarded, and if so how they are properly to be calculated, given that it is likely that Defendants' counsel cannot provide specific evidence as to the amount of time they devoted to

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[5] Docket No. 352.

that claim only. The parties' submissions shall be filed by not later than September 2, 2003.

IT IS SO ORDERED.

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT CUSANO, individually d/b/a Vinnie Vincent Music, d/b/a Streetbeat Music f/k/a Vinnie Vincent,

Plaintiff-Appellant,

v.

GENE KLEIN, an individual; STANLEY EISEN, an individual; THE KISS COMPANY, a New York Corporation; GENE SIMMONS WORLDWIDE INC., a Delaware Corporation; SIMSTAN MUSIC LTD., a Delaware Corporation; KISSTORY LTD.; POLYGRAM RECORDS, INC., a Delaware Corporation; HORIPRO ENTERTAINMENT GROUP, a California Corporation; PAUL STANLEY,

Defendants-Appellees.

No. 03-56650

D.C. No. CV-97-04914-AHM

ORDER

FILED
DEC 23 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: KOZINSKI and RAWLINSON, Circuit Judges, and EZRA,* District Judge.

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* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

The petition for rehearing and rehearing en banc is DENIED. See Fed. R. App. P. 35; Fed. R. App. P. 40.